AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Religion: Free Exercise

**Morris County Board of Chosen Freeholders v. Freedom From Religion Foundation**, \_\_\_ U.S. \_\_\_ (2017).

*The Morris County Board of Chosen Freeholders from 2012 to 2015 gave almost five million dollars to restore various church buildings, which was more than forty percent of the funds the board spent as part of a more general program to preserve historic buildings in the area. In 2015, the Freedom From Religion Foundation filed a lawsuit against the Board, claiming that the expenditures violated the religious establishment clauses of the state and federal constitutions. The board responded that the churches had a constitutional right under the New Jersey Constitution and under the free exercise clause of the First Amendment, as incorporated by the due process clause of the Fourteenth Amendment, to state moneys used for general programs. The trial court granted summary judgment to the board, but that decision was reversed by the Supreme Court of New Jersey. The board appealed to the Supreme Court of the United States.*

 *The Supreme Court denied certiorari. Justice Brett Kavanaugh, however, delivered a statement maintaining that New Jersey could not discriminate against religious organizations in distributing historic preservation funds. Kavanaugh nevertheless agreed with the decision not to take the case on the ground that the precise scope of the Morris County historic preservation program was unclear. Under what conditions would the scope of the program make distribution of funds to religious organizations unconstitutional? Under what conditions would the distribution of funds to religious organizations be constitutional? Some funds were used to rebuild churches where parishioners worshipped and others to restore religious paintings. Do these facts distinguish* Morris County *from such cases as* Trinity Lutheran Church of Columbia, Inc. v. Comer *(2017) or does the decision requiring states to disburse funds for religious playgrounds cover religious buildings and paintings?*

The petitions for writs of certiorari are denied.

Statement of Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=Ibbe59c8d390f11e99687ad62ac048e9b&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibbe59c8d390f11e99687ad62ac048e9b), with whom Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Ibbe59c8d390f11e99687ad62ac048e9b&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibbe59c8d390f11e99687ad62ac048e9b) and Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=Ibbe59c8d390f11e99687ad62ac048e9b&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibbe59c8d390f11e99687ad62ac048e9b) join, respecting the denial of certiorari.

. . . .

As this Court has repeatedly held, governmental discrimination against religion—in particular, discrimination against religious persons, religious organizations, and religious speech—violates the Free Exercise Clause and the Equal Protection Clause. In the words of Justice Brennan, the “government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits.” Under the Constitution, the government may not discriminate against religion generally or against particular religious denominations. . . .

Put another way, the government may not “impose special disabilities on the basis of ... religious status.” *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990).

. . . .

That same principle of religious equality applies to governmental benefits or grants programs in which religious organizations or people seek benefits or grants on the same terms as secular organizations or people—at least, our precedents say, so long as the government does not fund the training of clergy, for example. In [*Trinity Lutheran*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2041944292&originatingDoc=Ibbe59c8d390f11e99687ad62ac048e9b&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) *Church of Columbia, Inc. v. Comer* (2017), Missouri barred a religious school from obtaining a state funding grant for the school's playground. By contrast, Missouri allowed secular private schools to obtain state funding grants for their schools' playgrounds. This Court held that Missouri's law was unconstitutional. The Court stated that the Constitution “protects religious observers against unequal treatment.”

In this case, New Jersey's “No religious organizations need apply” for historic preservation grants appears similar to, for example, Missouri's “No religious schools need apply” for school playground grants and New York's “No religious clubs need apply” for use of school facilities and Tennessee's “No ministers need apply” for state office. . . . Barring religious organizations because they are religious from a general historic preservation grants program is pure discrimination against religion.

At some point, this Court will need to decide whether governments that distribute historic preservation funds may deny funds to religious organizations simply because the organizations are religious. But at this point and in this case, it is appropriate to deny certiorari, for two main reasons. First, the factual details of the Morris County program are not entirely clear. In particular, it is not evident precisely what kinds of buildings can be funded under the Morris County program. That factual uncertainty about the scope of the program could hamper our analysis of petitioners' religious discrimination claim. Second, this Court decided *Trinity Lutheran* only recently, and there is not yet a robust post-*Trinity Lutheran* body of case law in the lower courts on the question whether governments may exclude religious organizations from general historic preservation grants programs.

For those reasons, denial of certiorari is appropriate. As always, a denial of certiorari does not imply agreement or disagreement with the decision of the relevant federal court of appeals or state supreme court. In my view, prohibiting historic preservation grants to religious organizations simply because the organizations are religious would raise serious questions under this Court's precedents and the Constitution’s fundamental guarantee of equality.