COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-12274

GEORGE CAPLAN and others,

Plaintiff-Appellants,

v.

TOWN OF ACTON, MASSACHUSETTS, inclusive of its instrumentalities and the Community Preservation Committee,

Defendants-Appellees.

On Direct Appellate Review of an Interlocutory Appeal from an Order of the Middlesex Superior Court

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Defendants-Appellees' Memorandum of Law Concerning *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*

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INTRODUCTION

Defendants-Appellees (the "Town") submit this Memorandum of Law to address the impact of the Supreme Court's recent decision in Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. ___, 137 S. Ct. 2012 (2017) (No. 15-577), on this case. In Trinity Lutheran, the Court held that Missouri's refusal to grant funds to a church that qualified for funding violated the Free Exercise Clause of the First Amendment. That decision decisively supports the Town's position in this case.

ARGUMENT

I. Trinity Lutheran Confirms the Town's and the Superior Court Interpretation of the Anti-Aid Amendment to Permit the CPA Funding in this Case.

The Trinity Lutheran Church applied for state funding to resurface its playground. It qualified for that funding under the neutral criteria of the grant program. However, based on a prohibition in the Missouri Constitution against using any public funds in aid of a church, the state deemed the church "categorically ineligible" for the grant. Trinity Lutheran, 137 S. Ct. at 2018.[1]

[1] Missouri Const. Art. I, § 7 states:

The Supreme Court held that the First Amendment forbids a state from excluding a church from eligibility for a public benefit for which it otherwise qualifies, even under a state constitutional provision prohibiting public funding of churches. Id. at 2024-2025. Such a blanket exclusion requires a church to choose between receiving government benefits and maintaining its identity as a religious entity, penalizing its free exercise of religion. Id. at 2021-2022. In the 7-2 decision, Chief Justice Roberts wrote that Missouri's exclusion of churches "expressly discriminates ... by disqualifying them from a public benefit solely because of their religious character." Id. at 2021. His conclusion could not have been stronger: "the exclusion of [a church] from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution ... and cannot stand" under the First Amendment. Id. at 2025.

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

Justice Roberts attempted to cabin the Court's holding by stating: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." Id. at 2024 n. 3. Four other justices agreed with that limitation. See id. (Breyer, concurring). Justices Gorsuch and Thomas joined the entire opinion except that footnote. They strongly suggested that excluding churches from other funding would violate the Free Exercise Clause, as well. Id. at 2026.[2]

In this case, the Taxpayers would have Acton do precisely what the Supreme Court has forbidden. They argue the Anti-Aid Amendment "prohibits the 'use of public money ... for the purpose of ... maintaining or aiding any church,' full stop." Appellants' Brief at 11. And again, the "Anti-Aid Amendment's prohibition against the use of public money 'for the purpose of founding, maintaining or aiding any church, religious denomination or society' is unequivocal and unqualified." *Id.* at 12. They have made it clear that their reading of the Anti-Aid Amendment rests squarely

[2] Justices Sotomayor and Ginsburg dissented.

on the fact that the CPA funding recipients in this case are churches: "the same public aid that is prohibited to a church might be permitted to a non-religious entity that satisfies the Helmes test." Appellant's Reply at 5. Indeed, at the preliminary injunction hearing, counsel acknowledged that their only objection to the funding of the Master Plan and window restoration is the identity of the recipient. JA1306 ("[I]t's not the Acton Women's Club, and it's not an art museum that's displaying these stained glass windows. These stained glass windows have a meaning, have a purpose within the context of an active house of worship."). That reading of the Anti-Aid Amendment, whatever conceivable merit it may have had before Trinity Lutheran, is now foreclosed.

The Taxpayers have not shown, and cannot show, that automatically disqualifying churches from CPA historic preservation funding is justified by "a state interest of the highest order." Trinity Lutheran, 137 S. Ct. at 2024 (quotations omitted). Rather, "'the state interest asserted here – in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution – is limited by the Free Exercise

Clause.'" *Id*. (citation omitted). The decision in Trinity Lutheran compels affirmance of the Superior Court's decision.

II. The Taxpayers Cannot Distinguish Trinity Lutheran.

To make any colorable argument that Acton could have denied CPA funding to the churches based on the Anti-Aid Amendment without violating the Free Exercise Clause, the Taxpayers must distinguish Trinity Lutheran effectively. They cannot rely on the constitutional provisions: the Missouri constitutional provision in Trinity Lutheran is phrased as strongly as the Anti-Aid Amendment. Nor can they rely on the grant programs: the CPA is as neutral and objective as Missouri's program.

That leaves only the object of the funding as a conceivable basis for distinction. In their Motion for Leave to File Supplemental Brief, the Taxpayers argued that *Trinity Lutheran* is distinguishable because it involved "ancillary property" - a playground – rather than a church building. Motion for Leave, ¶s 5-6. That argument is both inaccurate and irrelevant.

The Taxpayers' purported distinction is inaccurate because the Acton Congregational Church's ("ACC") grant included funding to restore two houses

owned by the church, as well as for a master plan study of the church structure. JA356. Those houses are rented out as residences and not used for any religious purposes. JA358. They are at least as ancillary to religious exercise as a playground.[3]

The Taxpayers are also wrong to try to characterize the rehabilitation and preservation of even the ACC church building as any more religious than the playground re-surfacing in Trinity Lutheran. The purpose of the CPA grant is historic preservation of the exterior of historic buildings in the state and national register historic districts. As described below, Acton's CPA grant funds cannot be used for an "essentially religious endeavor" (Trinity Lutheran, 137 S. Ct. at 2023). See Appellee's Brief at 33-36.

The Taxpayers' argument about the object of the funding is irrelevant because the Supreme Court's opinion admits of no such distinction. The majority's

[3] As the dissent in Trinity Lutheran noted without refutation, the playground was part of the religious mission of the Child Learning Center at Trinity Lutheran Church "to allow a child to grow spiritually." Trinity Lutheran, 137 S. Ct. at 2028 (Sotomayor, dissenting). The "playground surface cannot be confined to secular use any more than lumber used to frame the Church's walls, glass stained and used to form its windows, or nails used to build its altar." Id. at 2030.

conclusion quoted above is sweeping and unequivocal, with no suggestion that it rested on the ancillary nature of the playground. And Justices Gorsuch and Thomas rather clearly would have reached the same conclusion regarding other church features and activities, as well. Trinity Lutheran, 137 S. Ct. at 2026 (Gorsuch, concurring).

The Taxpayers may argue that the ACC's stained glass windows are a religious feature that may be excluded from CPA funding without violating the Free Exercise Clause. However, that argument would fail under Trinity Lutheran, as well.

Some of the stained glass windows do contain biblical imagery. However, all the windows are undisputedly artistic and historic, as well as integral parts of the building, JA399-415, 436-451, and it is undisputedly for those qualities that they would receive historic preservation funding under the neutral CPA criteria, not any religious symbolism they may contain. At least a six-justice majority of the Supreme Court would find an exclusion of the restoration of those windows solely because they

belong to a church "odious" to the Free Exercise Clause.[45]

III. Trinity Lutheran Confirms that the Helmes Factors Remain the Appropriate Framework for Applying the Anti-Aid Amendment.

The SJC must interpret the Anti-Aid Amendment consistent with the Free Exercise Clause as applied in Trinity Lutheran. This Court's three-factor framework

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[4] To exclude only the windows containing biblical imagery from CPA funding would be even less defensible. That would not only require a minute assessment of whether each stained glass window contains religious imagery, an inquiry forbidden under Martin v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints. 434 Mass. 141, 150 (2001) (Dover Amendment case; "It is not for judges to determine whether the inclusion of a particular architectural feature is "necessary" for a particular religion. A rose window at Notre Dame Cathedral, a balcony at St. Peters Basilica--are judges to decide whether these architectural elements are "necessary" to the faith served by those buildings?"). Nothing in Trinity Lutheran's interpretation of the Free Exercise Clause permits such hair-splitting, either.

[5] In requesting to brief *Trinity Lutheran*, the Taxpayers noted that they have not raised a Free Exercise claim and the Town has not pleaded it as a defense. Motion for Leave, ¶ 6. If they now raise that point to distinguish Trinity Lutheran, it should be rejected. Of course there is no Free Exercise claim in this case: the Town granted the CPA funding to the churches. If the Town had denied that funding as the Taxpayers urge, the churches would have had precisely such a claim. Nor was the Town required to raise the Free Exercise Clause as an affirmative defense. The Free Exercise Clause is not a defense to a violation by the Town of the Anti-Aid Amendment; it constitutes an irrefutable argument for interpreting the Anti-Aid Amendment to authorize the CPA funding in this case.

under Helmes v. Commonwealth, 406 Mass. 873 (1990), does precisely that. In doing so, the Commonwealth avoids the problem forecast by the Trinity Lutheran dissent that so-called Blaine amendments, of which the Anti-Aid Amendment is one, "are all but invalidated today." Trinity Lutheran, 137 S. Ct. at 2041 (Sotomayor, dissenting).

As described in the Town's initial Brief, the Helmes factors ensure that the Anti-Aid Amendment is interpreted to treat religious and secular entities equally and address any concerns that the funding unduly benefit religious or private entities. Appellees' Brief at 18-27, 39-40. Those factors, and the Town's faithful application of them here, avoid any violation under the Establishment Clause or the Anti-Aid Amendment because the funds cannot be used for an "essentially religious endeavor." Trinity Lutheran, 137 S. Ct. at 2023. They satisfy even the dissent, in which Justice Sotomayor acknowledges that the Court "has found some direct government funding of religious institutions to be consistent with the Establishment Clause" where "the funding ... came with assurances that public funds would not be used for

religious activity, despite the religious nature of the institution." Id. at 2029 (Sotomayor, dissenting).

In compliance with the Helmes factors, Acton has required such assurances in awarding CPA grant funds. JA180, 533-548 (grant conditions limit reimbursement to the amount spent on the eligible CPA historic preservation project and require a historic preservation restriction). The Helmes framework remains the appropriate approach to the Anti-Aid Amendment under Trinity Lutheran.

CONCLUSION

For the reasons stated above, in addition to those in the Town's initial brief, this Court should affirm the Superior Court's decision denying the Taxpayers' Motion for Preliminary Injunction.

By their attorneys,

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MASS. R. APP. P. 13(d) CERTIFICATE OF SERVICE

I certify under the penalties of perjury that on August 2, 2017, I caused a true and correct copy of the foregoing document to be served by electronic mail on counsel of record in this matter.

Nina L. Pickering-Cook