No. 13-449

In the Supreme Court of the United States

THE FALLS CHURCH, PETITIONER

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA AND THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

REPLY TO BRIEF IN OPPOSITION

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GLOSSARY

A____	Virginia Supreme Court joint appendix citation
Becket Fund Br.	Brief of the Becket Fund for Religious Liberty as Amicus Curiae in Support of Petitioners
Church	The Falls Church
Dennis Canon	TEC Canon I.7.4 and Diocese Canon 15.1
denomination	The Protestant Episcopal Church in the United States of America and the Protestant Episcopal Church in the Diocese of Virginia
Diocese	The Protestant Episcopal Church in the Diocese of Virginia
TEC	The Protestant Episcopal Church in the United States of America, also known as The Episcopal Church
TFC	The Falls Church
Va. Opening Br.	Brief for Appellant The Falls Church (Va. No. 120919) (Dec. 12, 2012)
Va. Reply Br.	Reply Brief for Appellant The Falls Church (Va. No. 120919) (Feb. 11, 2013)

REPLY TO BRIEF IN OPPOSITION

Respondents do not dispute that the lower courts are deeply divided over the constitutional significance of denominational "trust" rules. Nor do they deny the importance of the questions presented to millions of Americans—a point confirmed by the amicus briefs and 30 States' use of "neutral principles" doctrine to decide church property disputes. Respondents do not even try to rebut our showing that free exercise and establishment principles preclude enforcing denominational "trusts" not embodied in ordinary instruments of ownership reflecting all parties' intent. Accord Becket Fund Br. 7-23. And they do not contest that, if the court below applied state law retroactively, its ruling was unconstitutional.

Instead, respondents say the decision below "does not implicate" the lower-court "conflict" because the decision is "factbound" and "turns entirely" on "state law." Opp. 10. But that position is untenable. It evades not only the decision's free exercise and establishment implications, but also (1) the court's reliance on *Jones*' "recognition" (in *dictum*) "that 'the constitution of the general church can be made to recite an express trust in favor of the denomination[]'"; (2) its holding that it "need look no further than the Dennis Canon" (which was void when enacted) to rule for the denomination; and (3) its conclusion that to "address any issues of inequity wrought [by the Dennis Canon]" would "clearly violate the First Amendment." Pet. 15a, 18a, 21a (quoting *Jones*).

Respondents insist that the ruling below involves no "retroactive application of a newly created rule," and that the Dennis Canon only made "explicit" what had been "implicit" in the parties' relationship. Opp.

10, 5. But they cannot explain how petitioner—or its grantors—could "agree" to place property in trust for respondents when "Virginia law prohibited denominational trusts." Opp. 7.

Hoping to avoid the appearance of retroactivity, respondents say the court did not find "a trust at all," but rather fashioned a "remedy"—forfeiture—for breach of some free-floating "fiduciary duty." Opp. 14. But as the court explained, a "constructive trust" is "a form[] of implied trust." Pet. 16a. And if respondents were correct, the court would not have needed to hold that §57-7.1 changed the law—the centerpiece of its decision. Pet. 14a.

Like the court below, respondents cite *no* evidence that petitioner consented to a trust after §57-7.1 was enacted. Not surprisingly, ruling for respondents required concocting a trust "'independently of the intention of the parties'" (Pet. 16a)—a grave constitutional violation. *Jones*, 443 U.S. at 606 (courts must "give effect to the result indicated by the parties").

In sum, respondents do not contend that the Court *should not* resolve the lower-court split—just that it *cannot* do so here. But respondents' state-law premise is incorrect. And even if the court below *had* relied solely on state law, the free exercise implications of its decision and its retroactive nature would independently enable the Court to resolve the conflict. The only conceivable basis for imposing a retroactive trust on church property over its owner's objection is that the First Amendment requires that result *regardless of state law*—the precise question that splits thirteen state high courts. However that question is resolved, guidance is needed, and this case presents an excellent opportunity for the Court to answer it.

I. For three independent reasons, review will enable this Court to resolve the lower-court split over the constitutional significance of denominational "trust" rules.

Respondents say the ruling below "turns entirely" on "state law" and "does not implicate" any "decisional conflict." Opp. 10. For three independent reasons, however, that is incorrect, and respondents can suggest otherwise only by avoiding critical portions of the decision.

A. The lower court mistakenly believed that the First Amendment required enforcing the Dennis Canon.

1. Respondents ignore the parts of the decision below that foreclose their "state law" reading. For example, they nowhere acknowledge the court's holding that because the Dennis Canon was "enacted through a process resembling a representative form of government," the court was "powerless to address any issues of inequity wrought thereby"—"to do so would invite judicial interference with religion and clearly violate the First Amendment." Pet. 21a. They likewise evade the court's explanation that the Dennis Canon was a "'matter[] of church government'" and "'religious freedom'" that must be enforced "'free from state interference.'" *Ibid.* (citation omitted).

Respondents also avoid the court's statement that, to find "the necessary fiduciary relationship," it "need look no further than the Dennis Canon"—which was "'invalid under Virginia law'" when adopted. Pet. 11a. And they ignore the court's explanation that the Dennis Canon was a "direct response to the Supreme Court's recognition that 'the constitution of the general church can be made to recite an express trust in

favor of the denominational church.'" Pet. 15a (quoting *Jones*). In short, respondents never mention the passages of the opinion that invoke the First Amendment and "give direct legal effect to the Dennis Canon." Opp. 15.

2. To be sure, the court cited state constructive trust principles. But these principles were not "ordinary," "established," or applied without regard to the First Amendment, "just as they would be applied" to "secular entities." Opp. 1.

The court rejected the only state-law trust theory respondents pressed—that the Dennis Canon created an "express trust." Pet. 13 n.8. Because respondents contributed no funds toward purchase of the properties, it was "readily apparent" that there was no "resulting trust." Pet. 16a. And since respondents had never asserted or presented evidence supporting a constructive trust, the court's principal basis for imposing such a trust was respondents' "constitution and canons," and "specifically the adoption of the Dennis Canon"—church law. Pet. 22a.

The court relied on no precedent involving analogous facts or similarly situated secular associations, let alone decisions determining real property ownership without analyzing the deeds. Section 57-7.1 requires a "conveyance," but the court did not attempt to find one. In purporting to find that petitioner "agreed" to hold its property for respondents' benefit (Pet. 22a), the court pointed to no specific evidence of petitioner's consent. It pointed only to the Dennis Canon and the ordinary incidents of petitioner's denominational affiliation—which began 160 years before denominational trusts became lawful, when the canons required that "all" property, including "here-

after"-acquired property, be held for "the congregation." A5912a.

This was no ordinary, "secular," "neutral" analysis that "obviate[d] entirely the need" for "examination of ecclesiastical polity." *Jones*, 443 U.S. at 603, 605. The court relied on a church canon that could not create a traditional trust, ignoring state law governing ownership of secular property and declaring itself "powerless" to do otherwise without "violat[ing] the First Amendment." Pet. 21a. The only plausible explanation is that the court was endeavoring "to avoid a perceived conflict with federal * * * constitutional requirements." *Three Affiliated Tribes* v. *Wold Eng'g, P.C.*, 467 U.S. 150, 152 (1984). And where "a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law," this Court routinely "review[s] the federal question on which the state law determination appears to have been premised." *Ibid.*

In sum, the court below believed it was compelled to enforce a trust in favor of the denomination. Four other state supreme courts share that view; eight reject it. Review is warranted.

B. The decision below is retroactive, and that independently enables the Court to resolve the lower-court split.

Respondents' insistence that the decision below involves no "retroactive application of a newly created rule" (Opp. 10) is likewise incorrect. As explained below, moreover, the decision's retroactive nature independently enables the Court to resolve the lower-court split.

1. Not surprisingly, respondents do not deny that if the court below divested petitioner of its property

by applying state law retroactively, its ruling was unconstitutional. Churches and denominations must be able to "order[] private rights and obligations to reflect the intentions of the parties" (*Jones*, 443 U.S. at 603), and applying legal changes retroactively deprives them of that ability.

Instead, respondents contend that the court below "did not apply §57-7.1 retroactively." Opp. 16. But that view is unsupportable. The linchpin of the decision was its application of §57-7.1 to conduct predating its enactment. The court held that denominational trusts became lawful "with the passage of Code §57-7.1." Pet. 14a. Until then, "denominational trusts, whether express or implied," were "'invalid.'" Pet. 10a-11a. And despite its view that "the Dennis Canon" was "ineffective" when adopted (Pet. 16a), the court imposed a "constructive trust" based on "the Dennis Canon, and the course of dealing between the parties" beginning in 1836 (Pet. 22a).

Respondents acknowledge that the court below, "in determining [that] a fiduciary relationship existed," relied on "evidence concerning that relationship back to its foundation in 1836." Opp. 17. And they cannot dispute that, whatever "course of dealing" the parties engaged in, they cannot lawfully have "intended, agreed and expected that the property at issue would be held in trust * * * for [respondents']" before 1993. Pet. 22a. Parties cannot agree to violate state law, or have an illegal fiduciary duty.

In respondents' view, relying on pre-1993 conduct was valid because pre-1993 law "only prohibited giving legal effect to denominational trusts themselves," not "considering denominational trust provisions" as "evidence demonstrating the nature of the parties'

relationship." *Ibid.* Yet the court below did not consider the parties' relationship for independent evidentiary purposes. Its sole purpose was to determine "whether the property was subject to an implied trust." Pet. 16a.

Recognizing this, respondents say "a constructive 'trust' is not really a trust at all." Opp. 14. But the court below called constructive trusts a "form[] of implied trust," and its holding that petitioner breached a "'fiduciary obligation'" sounded in trust law. Pet. 16a. True, constructive trusts are not "traditional" in that they are remedial and are not based on any "legal instrument derived from the parties' intent." Opp. 7. The fact that constructive trusts arise "'independently of the intention of the parties'" (Pet. 16a), however, only underscores the lower court's free exercise violation (*infra* at 10) and its efforts to override ordinary secular law (*supra* at 4-5). And the court could not possibly have imposed a constructive trust without concluding that §57-7.1 changed the law.

Finally, respondents note that the court below cited "evidence post-dating enactment of §57.7-1," and "simply applied the existing, settled state law rule that a constructive trust 'relate[s] back to the time when the property began to be wrongfully held'"—in 2006. Opp. 17 (citation omitted). Respondents are wrong: The court relied on post-1993 conduct in finding that petitioner *breached* its purported fiduciary duty, not in finding that a duty *existed*. Respondents, like the court below, point to no post-1993 consent to a trust—only a continuation of the parties' affiliation.

2. Lacking convincing arguments that the ruling below was not retroactive, respondents say this case does not involve the question reserved in *Jones* be-

cause Virginia first applied neutral principles "before *Jones*." Opp. 16. According to them, *Jones* was concerned only with retroactively applying neutral principles *in general*, under the *common law*, not "retroactive application of a state *statute*." Opp. 16-17.

Respondents never explain, however, why this difference matters. The constitutional interest at stake is that the law be stable, so parties can "order[] private rights and obligations to reflect the[ir] intentions." *Jones*, 443 U.S. at 603. That interest applies no less to congregations than to denominations. And it is no less threatened by retroactive application of statutes than by retroactive changes in the common law. Indeed, inasmuch as common law changes are often incremental or murky, this case is a *better* vehicle for addressing the retroactivity issue than one involving a shift from one common-law approach to another. Cf. *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Protection*, 130 S. Ct. 2592, 2609 (2010) (plurality); *id.* at 2615 (Kennedy, J., concurring).

For 260 years, petitioner's members contributed land, money, and labor in reliance on settled Virginia law—only to have the court below divest the Church of title based on a 1993 statute, conduct predating the statute's adoption, and a 1979 canon that was invalid when passed. It is difficult to imagine a more abrupt, 180-degree change in the law. Even by respondents' standard—whether Virginia now applies "a different approach to resolving church property disputes" than "in the past" (Opp. 16)—the case presents the free-exercise issue reserved in *Jones*. 443 U.S. at 606 n.4.

3. The retroactive nature of the decision below independently ensures that this Court can reach the

issue that divides the lower courts. The only theory that might conceivably justify imposing a retroactive trust on a church's property is that, even before Virginia law changed, the *First Amendment* required enforcing denominational trust rules. Thus, considering the retroactivity issue will enable this Court to decide whether the First Amendment requires such enforcement of church rules—which divides thirteen state supreme courts.

C. The free exercise and establishment implications of the decision below provide an independent federal basis to resolve the lower-court split.

Respondents' view that the petition "does not implicate any federal question" (Opp. 15) also neglects our showing that the First Amendment does not *permit*, much less require, ignoring a church's deeds and the grantors' intent while giving effect to "trusts" declared in denominational documents. Pet. 30-32, i. That provides a third independent basis for reviewing the constitutional significance of denominational "trusts." See *Three Affiliated Tribes*, 467 U.S. at 152 (where state courts "construe state law broadly in the belief that federal law poses no barrier to the exercise of state authority," the Court will review their "incorrect perception of federal law"). And deciding whether the First Amendment *permits* such an approach will enable the Court to decide whether the First Amendment *requires* it.

Respondents wholly avoid this part of the petition. They do not dispute that no other Virginia entity can declare a trust in property titled in others' names, or that granting this right to denominations alone raises establishment concerns and "imposes special disabili-

ties" based on "religious status." *Lukumi*, 508 U.S. at 533. They do not defend this favoritism of denominations as a religious accommodation. They evade our showing that courts may not presume donors are motivated by denominational loyalty. Pet. 30-31. And as their own authority recognizes, courts have an "obvious duty" to enforce "the instrument by which [the parties'] purpose is evidenced"; denominational rules affect property ownership only if they satisfy "the formalities which the law requires." *Watson*, 80 U.S. at 723; see Becket Fund Br. 17-19.

Respondents dispute that the court below "did not even *consider* the deeds, let alone the grantors' intent." Pet. 30. They say the court "found" as a "fact" that "TFC, [TEC], and the Diocese together 'intended, agreed and expected that the property at issue would be held in trust by [TFC] as trustee for [respondents'] benefit.'" Opp. 13 (quoting Pet. 22a). Absent from this list of parties, however, are *the grantors*, who cannot lawfully have created a denominational trust before 1993. And the term "deed" appears *nowhere* in the court's trust analysis. Pet. 15a-22a.

We addressed petitioner's intent above (at 6-7). Here we stress that the lower court's imposition of a trust "independently of the intention of the parties" (Pet. 16a) is unconstitutional. The First Amendment requires "giv[ing] effect to the result indicated by the parties" (plural). *Jones*, 443 U.S. at 606. Courts may not rely solely on a denomination's intent.

"[Where] there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the[ir] evidentiary basis." *Times, Inc.* v. *Pape*, 401 U.S. 279, 284 (1971). Even in cases arising in state

courts, "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace," and this Court "decide[s] for [itself] whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley* v. *Irish–American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 567 (1995).

In sum, three aspects of the decision below independently enable the Court to resolve the entrenched split over the constitutional significance of denominational "trust" rules: the court's view that the First Amendment rendered it "powerless" to override the Dennis Canon, the decision's retroactive nature, and its free exercise and establishment implications. Review is warranted.

II. The decision below conflicts with the Court's Contracts Clause decisions, an independent basis for review.

Review of the Contracts Clause question is also warranted. In respondents' view, that question is not "independently certworthy," and we cite no cases involving "similar circumstances." Opp. 18. Yet they ignore our showing (Pet. 34-35) that the decision below conflicts with this Court's precedents—an independent basis for review. Rule 10(c). In particular, *Terrett* v. *Taylor* held that the Contracts Clause prohibits States from "divest[ing] [a] church" of "property already acquired under the faith of previous laws." 13 U.S. at 52. Indeed, respondents acknowledge that it is "unconstitutional" to "apply [Virginia statutes] to alter existing rights" or "trusts established in governing deeds." A9065.

Respondents say this question was not "pressed" below. Opp. 18. Not so. Petitioner argued that "ret-

roactively applying statutes and canons passed after the conveyances at issue" would "violat[e] * * * the Contracts Clause." Va. Opening Br. 41; accord *id.* at 42-43; Va. Reply Br. 12-13 ("[§57-7.1] could not be applied retroactively"; "it is unconstitutional for laws to 'deprive[] the *cestuis que* trusts'" of "'property rights'"). The court mistakenly believed it need not reach the question (Pet. 34), but it was preserved—and should be addressed. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985) (addressing question not addressed below).

CONCLUSION

The Virginia Supreme Court imposed a trust on petitioner's property based on a retroactive application of a new law and a church canon that all agree was legally void when adopted. The court deemed itself "powerless" under the First Amendment to do anything else, and its decision deepened an acknowledged split among thirteen state supreme courts over the constitutional significance of denominational "trust" rules. Certiorari should be granted.

Respectfully submitted.

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