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

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

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QUESTION PRESENTED

Whether the First Amendment permits civil courts to impose a "trust" on church property based on ecclesiastical law, when that ecclesiastical law would otherwise have no legal effect under ordinary principles of state property or trust law.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country. The Becket Fund has represented churches with virtually every sort of religious polity, including congregational, hierarchical, connectional, presbyterial, synodical, trustee-led, and others.[2]

Because the First Amendment protects the right of internal church governance, The Becket Fund has resolutely opposed government interference in matters of church polity. For example, The Becket Fund represented the nation's oldest Hindu temple in a dispute over whether a state court could impose a congregational membership polity on a trustee-led, non-membership organization. See *Hindu Temple Soc'y of N. Am.* v. *Sup. Ct. of N.Y.*, 335 F. Supp. 2d 369, 374 (E.D.N.Y. 2004). It has also represented congregational, synodical, and hierarchical religious groups in opposing government interference with their freedom to select ministers. See *Hosanna-Tabor*

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* certify that no part of this brief was authored by counsel for any party, and no counsel or party made a monetary contribution to the preparation or submission of the brief. Counsel of record received timely notice of intent to file this brief and have granted their consent.

[2] This brief uses the term "church" broadly to refer to religious associations of all traditions, including non-Christian traditions.

Evangelical Lutheran Church & Sch. v. *EEOC*, 132 S. Ct. 694 (2012) (commissioned minister at Lutheran school); *Int'l Mission Bd.* v. *Turner*, 977 So. 2d 582 (Fla. Dist. Ct. App. 2008) (Southern Baptist missionary); *Curay-Cramer* v. *Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 141 (3d Cir. 2006) (religion teacher at Roman Catholic school).

The Becket Fund thus has an interest in this case not because it favors any particular religious organization or type of polity, but because it seeks an interpretation of the First Amendment that will maximize religious liberty for all religious organizations, no matter their polity. The Becket Fund is concerned that the Virginia Supreme Court's decision, in conflict with decisions by other state courts, makes it more difficult for churches to embody their polity in a stable, predictable form, and entangles courts in religious questions in violation of the First Amendment.

SUMMARY OF THE ARGUMENT

I. State supreme courts are deeply divided over the legal standards governing church property disputes. Eight state supreme courts and the Eighth Circuit hold that courts are permitted to resolve church property disputes just like any other property dispute within a voluntary association—that is, by applying ordinary principles of property and trust law to deeds, trust agreements, and other legal instruments. Pet. 19-23. Five state supreme courts, by contrast, hold that courts are required to give special weight to ecclesiastical rules adopted at the denominational level—even when those rules are not in legally cognizable form and would be insufficient to create a property interest under ordinary princi-

ples of property and trust law. Pet. 24-28. The division has produced conflicting results in nearly identical cases. It causes tremendous uncertainty for churches across the country. And because it results largely from an ambiguous *dictum* in *Jones* v. *Wolf*, 443 U.S. 595 (1979), only this Court can resolve it.

II. Without this Court's intervention, several disturbing consequences will follow in those states that require civil courts to enforce denominational rules that lack cognizable legal form. First, such courts actually make it more difficult for many churches to embody their religious polity in a stable, predictable form, thus interfering in church governance in violation of the First Amendment. Second, by enforcing rules embodied in canon law or its equivalent, rather than in deeds, trusts, or other legal documents, courts inevitably become entangled in religious questions. Third, by allowing church rules to trump ordinary principles of property and trust law, courts unsettle private property rights, harming both churches and third parties.

To avoid these results, this Court should grant certiorari and clarify that the only way to protect all forms of religious polity in the context of property disputes is to apply ordinary principles of property and trust law to ordinary civil legal documents. Under this approach, if a denomination determines that local property should be under national control, it can require local churches to adopt use restrictions, execute trust agreements, or place title in the name of the bishop—as many denominations already do. If a denomination determines that local property should be under local control, it can place title in the local congregation—like the property here. And if a denomination decides to change the

way it holds church property, it can change the legal documents accordingly. This is how the Roman Catholic Church gained control over local church property during the "trusteeism" controversy in the 1800s. See p. 16, *infra*. And it is the only approach that puts control over church governance exclusively in the hands of churches—not courts.

REASONS FOR GRANTING THE WRIT

I. State supreme courts are deeply divided over the legal standards governing church property disputes.

As the Petition demonstrates (at 17-22), state supreme courts have adopted two conflicting versions of the "neutral principles" approach to church property disputes. The first version, adopted by eight state supreme courts and the Eighth Circuit, treats churches like any other voluntary association.[3] Under this approach, ownership turns on ordinary principles of property and trust law, as applied to the deeds, corporate charter, and civil legal documents. Ecclesiastical rules are given legal effect only if they

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[3] *Masterson* v. *Diocese of Nw. Tex.*, 2013 WL 4608632 (Tex. Aug. 30, 2013); *Presbytery of Ohio Valley, Inc.* v. *OPC, Inc.*, 973 N.E.2d 1099 (Ind. 2012); *Hope Presbyterian Church of Rogue River* v. *Presbyterian Church (U.S.A.)*, 291 P.3d 711 (Or. 2012); *All Saints Parish Waccamaw* v. *Protestant Episcopal Church*, 685 S.E.2d 163 (S.C. 2009); *St. Paul Church, Inc.* v. *Bd. of Trustees of the Alaska Missionary Conference of the United Methodist Church, Inc.*, 145 P.3d 541 (Alaska 2006); *Berthiaume* v. *McCormack*, 891 A.2d 539 (N.H. 2006); *In re Church of St. James the Less*, 888 A.2d 795 (Pa. 2005); *Ark. Presbytery of the Cumberland Presbyterian Church* v. *Hudson*, 40 S.W.3d 301 (Ark. 2001); *Church of God in Christ, Inc.* v. *Graham*, 54 F.3d 522 (8th Cir. 1995) (Missouri law).

are "embodied in some legally cognizable form"—such as a deed, trust agreement, or contract. *Jones*, 443 U.S. at 606.

Five state supreme courts have rejected this approach and have instead adopted special rules for churches deemed to be "hierarchical" in some way.[4] Under this approach, courts still refer to "neutral principles" of property and trust law; but they deviate from ordinary rules of property and trust law by holding that they are constitutionally bound to give legal effect to denominational rules adopted even after property was purchased for the benefit of, and in the name of, the local congregation. As a result, these courts treat canon law and similar denominational statements as legally enforceable even when they do not comply with the ordinary requirements of property, contract, or trust law. See, *e.g.*, *Christ Church*, 718 S.E.2d at 243-44 ("[R]equiring strict compliance [with trust law] would be inconsistent with the teaching of *Jones* v. *Wolf*.").

The seed of this division is an ambiguous *dictum* in *Jones*. Responding to criticism that the neutral-principles approach was too rigid, this Court explained that churches have various options for ensuring denominational control:

> They can modify the deeds or the corporate charter to include a right of reversion or trust in

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[4] Pet. App. 1a-36a; *Episcopal Church in Diocese of Conn.* v. *Gauss*, 28 A.3d 302 (Conn. 2011); *Rector, Wardens and Vestrymen of Christ Church* v. *Bishop of the Episcopal Diocese of Ga., Inc.*, 718 S.E.2d 237, 245 (Ga. 2011); *Episcopal Church Cases*, 45 Cal. 4th 467 (Cal. 2009); *Episcopal Diocese of Rochester* v. *Harnish*, 899 N.E.2d 920 (N.Y. 2008).

> favor of the general church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church.* The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, *provided it is embodied in some legally cognizable form*.

443 U.S. at 606 (emphasis added).

According to courts that enforce canon law, this passage "not only gave general churches explicit permission to create an express trust in favor of the local church but stated that civil courts would be *bound* by such a provision, as long as the provision was enacted *before* the dispute occurred." *Gauss*, 28 A.3d at 325; see also Pet. App. 18a ("[W]e need look no further than the Dennis Canon."); *Presbytery of Greater Atlanta, Inc.* v. *Timberridge Presbyterian Church, Inc.*, 719 S.E.2d 446, 454 n.3 (Ga. 2011); *Harnish*, 899 N.E.2d at 924.

The problem with this interpretation is that it assumes that courts can *both* apply ordinary principles of property and trust law *and* enforce church constitutions. But under ordinary principles of property and trust law, church constitutions are not inherently enforceable.

Thus, eight state supreme courts and the Eighth Circuit have ruled in accordance with the qualifying phrase in *Jones*: "provided it is embodied in some legally cognizable form." According to these courts, trust language in church canons is not enforceable

unless the language comports with the ordinary requirements for creating a trust under state law.[5]

This split is now square and entrenched, with both sides fully developed. Pet. 19. The split creates tremendous uncertainty and foments property disputes across the country. And because the split results from an ambiguous *dictum* in *Jones*, only this Court can resolve it.

II. Church property disputes should be resolved by enforcing ordinary principles of property and trust law, not by giving special weight to ecclesiastical law.

This Court should clarify that church property disputes should be resolved by applying ordinary principles of property and trust law to deeds, contracts, and trust agreements, without giving special weight to ecclesiastical law. That rule produces a clear result here: The deeds are in the name of The Falls Church, and there is no valid trust agreement, because Respondents cannot declare a trust in another entity's property. See George T. Bogert, *Trusts* § 9 at 20 (6th ed. 1987) (trust settlor must own property).

Recognizing this, the Virginia Supreme Court invented a new kind of constructive trust over church property. Pet. 16a-18a. But to do so, it did not apply

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[5] *All Saints*, 685 S.E.2d at 174 (Dennis Canon "had no legal effect on title"); *Hudson*, 40 S.W.3d at 306-07 (courts must rely "exclusively on objective, well-established concepts of trust and property law"); *Graham*, 54 F.3d at 526 ("express terms of property instruments must be enforced"); *Berthiaume*, 891 A.2d at 548 (religious documents need not be examined).

ordinary principles of trust law, such as requiring "clear and convincing evidence" of a constructive trust before contradicting "conveyances in deeds" or overturning "record titles." C. Yzenbaard, G. Bogert, & G. Bogert, *Law of Trusts and Trustees* § 472 (3d ed. 2010). Instead, it claimed that it need "look no further than the Dennis Canon"—which was admittedly invalid when enacted—and that the Dennis Canon would somehow create a trust "independently of the intention of the parties." Pet. App. 18a, 16a. It cited no other court that has ever imposed such a constructive trust on church property.

This approach—which allows church canons to trump ordinary principles of property and trust law—contradicts the key principles of *Jones*. First, it denies churches the freedom to adopt certain forms of polity by placing a thumb on the scale in favor of denominational control. Second, it entangles courts in religious questions by forcing civil courts to interpret and enforce church law. Third, it confuses property rights by nullifying standard principles of property and trust law. Accordingly, the lower court's approach should be rejected.

A. Giving special weight to ecclesiastical law undermines the right of church governance.

The Virginia Supreme Court held that the resolution of this case "turns on the nature of the relationship between the parties"—specifically, the fact that this case involves what it called a "hierarchical" church. Pet. App. 17a. According to the court, the relationships within a "hierarchical" denomination are "analogous to a contractual relationship." Pet. App. 17a, 19a. Thus, when The Falls Church joined a

hierarchical denomination, it necessarily "agreed * * * that the property at issue would be held in trust * * * for the [denomination]" (Pet. App. 22a)—regardless of what the deeds or other legal instruments said.

This approach is fundamentally at odds with First Amendment principles. First, it assumes that all churches are either "congregational" or "hierarchical," and that every "hierarchical" church desires centralized control of church property. But in the real world, not all churches are purely "congregational" or "hierarchical," and many so-called "hierarchical" churches desire local control of property in the event of a rupture. Second, the lower court's approach pressures denominations toward a more "hierarchical" form of church government, denying churches the "power to decide for themselves, free from state interference, matters of church government." *Hosanna-Tabor*, 132 S. Ct. at 704.

1. In the religiously diverse American context, many religious associations are not strictly "congregational" or "hierarchical," and it is not easy for courts to determine how a church is organized. See *Jones*, 443 U.S. at 605 (noting that church government is often "ambiguous"). The "hierarchical" label best fits the Roman Catholic Church, where local parishes are subject to clearly-defined, descending levels of authority—from the Pope, to diocesan bishops, to priests. In Virginia, title to parish church property is typically held in the name of the diocesan bishop. A4304.

At the other end of the hierarchical–congregational spectrum, Quakers and independent Baptists exemplify the classic "congregational" model. These

groups are "strictly independent of other ecclesiastical associations." *Watson* v. *Jones*, 80 U.S. 679, 722 (1871). There are no religious bodies connecting individual congregations to each other, and they recognize no ecclesiastical head.

But many religious polities fall somewhere in between or change over time. Familiar examples include "mainline" Protestant denominations, such as Methodists, Presbyterians, Lutherans, and Episcopalians. Respondents here, for example, have long adhered to the "via media" or "middle way between the extremes of Catholicism and Puritanism." Donald S. Armentrout and Robert Boak Slocum, *Via Media*, in An Episcopal Dictionary of the Church: A User-Friendly Reference for Episcopalians 541 (Church Publishing 2005). Unlike the Roman Catholic Church, The Falls Church's vestry, clergy, and staff are selected by the local church, not the bishop or the denomination. Pet. 7.

In any event, a "hierarchical" form alone offers little insight into how any given church intends to hold property. Different Presbyterian denominations, for example, take different positions. The constitution of the Presbyterian Church (U.S.A.) ("PCUSA") states that all property of local congregations is held in trust for the denomination.[6] But the Presbyterian Church in America ("PCA"), with an ecclesial structure virtually identical to that of the PCUSA, affirms just the opposite: Local congregations retain their

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[6] *See The Book of Order: The Constitution of the Presbyterian Church (U.S.A.) Part II*, § G-4.0203 (2013-2015) ("All property held by or for a congregation * * * is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.).").

properties if they leave.[7] As one commentary has noted, "the mere outward presbyterial form—*i.e.*, a series of assemblies—does not necessarily import a functional hierarchy." Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 Harv. L. Rev. 1142, 1160 (1962).

Other religious groups cannot be located on a hierarchical–congregational spectrum at all. This is particularly true of non-Christian groups, which often do not share the Christian notions of "assembly" and "membership" that underlie the hierarchical–congregational dichotomy. See, *e.g.*, Willard G. Oxtoby, *The Nature of Religion*, in *World Religions: Eastern Traditions* 486, 489 (Willard G. Oxtoby ed., 2001) (Hindu temples have neither "members" nor "congregations."); Helen R. F. Ebaugh & Janet S. Chafetz, *Religion and the New Immigrants* 49 (2000) (Islamic mosques have neither congregations nor members); *Singh* v. *Singh*, 9 Cal. Rptr. 3d 4, 19 n.20 (Cal. Ct. App. 2004) (Sikh temples are not organized in "congregational" or "hierarchical" fashion); *Congregation Yetev Lev D'Satmar, Inc.* v. *Kahana*, 879 N.E.2d 1282, 1289 (N.Y. 2007) (Smith, J., dissenting) (Hasidic Jewish groups defy "congregational" or "hierarchical" classification). Just as the Nation's religious diversity means "it would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important

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[7] *See The Book of Church Order of the Presbyterian Church in America* (6th ed. 2007) §§ 25-9, 25-10 ("All particular [*i.e.* local] churches shall be entitled to hold, own and enjoy their own local properties, without any right of reversion whatsoever to any Presbytery * * *.").

issue of religious autonomy," *Hosanna-Tabor*, 132 S. Ct. at 711 (Alito, J., concurring), it would be a mistake to shoehorn all kinds of church polity into the two arbitrary categories of "congregational" and "hierarchical."

Finally, it is virtually impossible for an outsider to discern church polity from formal ecclesial structure alone. As one scholar of church governance put it, "the constitutions of church groups vary widely in how, and the extent to which, they provide the definitive clue to the governance patterns of those groups." Edward LeRoy Long, *Patterns of Polity: Varieties of Church Governance* 3 (2001). Some constitutions are widely ignored in practice; some are purely aspirational; and some are adopted over the opposition of a large minority of congregations. The true nature of a church's polity is a complex, nuanced factual question that civil courts are ill-equipped to resolve.

2. The Virginia Supreme Court ignored all this. It assumed that once a church is deemed "hierarchical," it must desire centralized control over property, and civil courts are bound to enforce denominational rules that express that desire—even when those rules contradict the relevant deeds and other legal instruments, even when they would be insufficient to create a property interest under ordinary principles of property and trust law, and even when they retroactively apply to property purchased and deeded according to different assumptions.

The problem with this approach is that not all religious groups want to organize themselves the same way. Some denominations, like the PCA, want local congregations to comply with denominational gov-

ernance, but to retain control over property after a split. See pp. 10-11 & n.7, *supra*. Local control may ensure that local congregations can serve as a check on theological drift at the national level. It may also encourage local congregations to affiliate with the denomination without risking loss of their property. Churches like the PCA may want this form of governance to be permanent, such that the denomination cannot change ownership of property merely by changing its denominational constitution.

But under the lower court's approach, it is *impossible* for denominations to adopt this form of governance and make it binding on themselves. Even if local congregations hold property in their own name, and even if canon law or similar denominational rules provide for local control, the denomination can always change those rules and assert national control later—even retroactively—just as Respondents did here. Effectively, then, the lower court's approach forces all religious groups into either idealized "hierarchical" or "congregational" forms, eliminating the choice of intermediate or alternative forms.

That is just what happened here. As Respondents' own expert admitted, when The Falls Church joined The Episcopal Church, the denomination was marked by "a strong opposition to any form of centralized government." A7705. That year, the Diocese adopted a canon providing that "[t]he Vestries * * * shall hold all [property] * * * *for the benefit of the congregation of said church*[.]" A5912-a (emphasis added). A decade later, this canon was amended to expressly recognize the exclusive property rights of congregations and vestries, and this language endured well into the 20th century. A5919-20 (1848); A5932-33 (1850); A5931 (1850); A5979-80 (1888);

A6049-50 (1904); see also A8327-28, A8331-33, A7535. During all those years, congregants made contributions of time and money in reliance on the legal instruments under which The Falls Church property was owned—only to have the denomination try to acquire title by adopting a new canon over a century later. In the lower court's hands, such changes in denominational canons become a one-way ratchet: All "hierarchical" aspects of church polity must be enforced as a matter of state law, while any "congregational" elements may be canceled by the denomination simply by changing denominational rules.

This Court has said time and again that religious organizations have a constitutional right "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Hosanna-Tabor*, 132 S. Ct. at 704. The only way to protect *all* forms of religious polity is to rely on *churches* to translate their polities into a "legally cognizable form." *Jones*, 443 U.S. at 606. This is not difficult. If a denomination determines that local property should be under denominational control, it can require parishes to adopt use restrictions, execute trust agreements, or place title in the name of the bishop—as Roman Catholic parishes do, and as Respondents have done for at least 29 other properties in the Diocese. *In re Episcopal Church Prop.*, 2008 WL 8649356, *28 (Va. Cir. Ct. 2008). If a denomination determines that local property should be under local control, it can place title in the local congregation—like the property here. And if a denomination decides to change the way it holds church property, it can change the legal documents accordingly. This is the only approach that protects

all forms of church governance and puts the power of making those decisions in the hands of churches, not courts.

3. It is no response to say, as the court did below, that church canons are legally enforceable because congregations "agreed to be bound by the[m]." Pet. App. 20a. This argument fundamentally misunderstands the nature of consent within a voluntary association. To be sure, the members of an association agree to be bound by the association's rules, in the sense that *they can be expelled for violating them*. But that does not mean that every rule of a voluntary association is enforceable in civil court.

For example, if a fraternal lodge adopts a new rule that members must donate fifty hours of service to the lodge each year, and a member fails to do so, the lodge may expel him—but it cannot obtain a court injunction forcing him to provide the service. The rule would be enforceable as a contract only if it met the ordinary rules for contract formation in the state. Similarly, if the lodge declares that it has a vested remainder in all members' real property upon their death, it will not obtain their property when they die. The property interest must be created by a formal conveyance. If a member refuses to make the conveyance, he can be expelled from the lodge; but the mere existence of the rule doesn't constitute a legal conveyance.

The same is true of a church. If a hierarchical church adopts a rule declaring a trust in local property, it can order local officials to record a trust deed or be expelled from the denomination. *Cf. Serbian E. Orthodox Diocese for U.S. & Can.* v. *Milivojevich*, 426 U.S. 696 (1976) (expelled bishop). But that rule is not

self-executing. The mere existence of the denominational rule, without more, does not create a legally cognizable trust—particularly when such a trust would be invalid as a matter of then-existing state law.

That was the experience of the Roman Catholic Church during the "trusteeism" controversy in the 1800s. After a series of disputes over the role of trustees in controlling church property, the bishops decreed at the First Provincial Conference of Baltimore in 1829 that, where possible, all church property should be held in the name of the diocesan bishop. John Gilmary Shea, *A History of the Catholic Church Within the Limits of the United States* 414 (1890) (describing Decree V). But dioceses did not seek to enforce this ecclesiastical decree by filing quiet-title actions in civil courts. Instead they used the Church's ordinary modes of discipline to force recalcitrant parishes to change their deeds in favor of the diocesan bishops. Peter Guilday, *Religion in America* 87-91, 180 (1932). In short, church canons are authoritative within the church, and can be enforced by ecclesiastical discipline, but they have no legal force unless they are embodied in the proper legal instruments.

Nor would this result come as a surprise to Respondents. The Episcopal Church has long recognized that its canons have only moral and ecclesiastical—not legal—effect. For example, in 1871, shortly after adopting its first local property canon, the General Convention recognized that such canons would have no legal effect unless Diocesan Conventions took "such measures as may be necessary, by State legislation, or by recommending such forms of

devise or deed or subscription," to make them effective.[8] Similarly, in 1924, the definitive commentary on the Constitution and Canons stated that a canon restricting the alienation of local property "is only of moral value, and has no legal effect."[9] The same commentary stated that another property canon "could only have moral weight * * * [and] would have no legal force." *Ibid.*

Even after the Dennis Canon was adopted, the definitive commentary on the Constitution and Canons stated that the "power of the General Convention over the disposition of real property is questionable, governed as it is by the law of the state in which it is situated," and that *Jones* "would appear to permit a majority faction in a parish to amend its parish charter * * * to affiliate the parish—and its property—with a new ecclesiastical group."[10]

4. In sum, the key question is: When are a denomination's ecclesiastical rules *enforceable in civil courts*? On that question, *Watson* and *Jones* are clear: Internal church rules are binding in "purely

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[8] *Journal of the Proceedings of the Bishops, Clergy, and Laity of the Protestant Episcopal Church in the United States of America Assembled in a General Convention in 1871* 372 (Printed for the Convention 1872).

[9] Edwin A. White, *Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America Adopted in General Conventions 1789-1922, Annotated* 785, 524 (New York: Edwin S. Gorham 1924).

[10] Edwin A. White & Jackson A. Dykman, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America*, 297, 301 (Church Publishing Inc. New York 1981 * 1997 reprint).

ecclesiastical" matters, such as issues of "church discipline, [or] ecclesiastical government"; but they are *not* binding on civil matters, such as the "right to property, real or personal." *Watson*, 80 U.S. at 733; *Jones*, 443 U.S. at 603 (distinguishing issues of "religious doctrine, polity, and practice" from issues of "trust and property law"). On civil property matters, church rules *become* binding only if they comply with "the formalities which the laws require," *Watson*, 80 U.S. at 723, and only if they are "embodied in some legally cognizable form." *Jones*, 443 U.S. at 606.

Watson was particularly clear on this point. There, the Court said that "an association of individuals may dedicate property by way of trust," and that it would be "the obvious duty of the court, in a case properly made, to see that the property so dedicated is not diverted from the trust." *Watson*, 80 U.S. at 723. But the Court included a key proviso: "*provided* that in [creating the trust] they * * * give to the instrument by which their purpose is evidenced, *the formalities which the laws require*." *Ibid.* (emphasis added). In other words, changes in denominational practices, reflected in canon law or its equivalent, create a trust only if they comply with "the formalities which the laws require." *Ibid.*

Jones said the same thing when it required church canons to be "embodied in some legally cognizable form." 443 U.S. at 606. In response, the dissent repeatedly criticized the majority for rejecting church canons unless they "ha[d] been stated, in express relation to church property, *in the language of trust and property law*." *Id.* at 612 (Powell, J., dissenting); *id.* at 612 n.1 (rejecting the "search for

statements *expressed in the language of trust and property law*"); *id.* at 613 n.2 (rejecting the requirement that churches "include a specific statement of church polity *in the language of property and trust law*") (emphases added).

In short, both *Watson* and *Jones* confirm that ecclesiastical rules are binding in civil property matters only if they comply with the requisite "formalities" and use the requisite "language of property and trust law." It is undisputed that the canons at issue here did not do so. Thus, giving those canons legal effect—much less retroactive legal effect—would only undermine the right of churches to control their polities through the ordinary instruments of property and trust law.

B. Giving special weight to ecclesiastical law entangles courts in religious questions.

Jones endorsed the neutral principles approach in large part because it "promise[d] to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Jones*, 443 U.S. at 603. But the lower court's rule, which requires direct civil enforcement of ecclesiastical law, reintroduces the same entanglement *Jones* sought to avoid.

In any church property dispute, there will typically be three main types of ownership evidence: (1) legal documents, such as the deed, corporate charter, state laws, or formal trust agreements; (2) church governance documents, such as a book of order or canons; and (3) evidence of church practice, such as who typically controls local property and how ecclesiastical laws are applied in practice. See Kent

Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 Colum. L. Rev. 1843, 1886 (1998).

When state trust and property law is used to settle church disputes, cases can be resolved entirely on the basis of the legal documents. In the present case, for instance, the deeds are in the name of The Falls Church, and a straightforward application of Virginia trust law would result in a finding that there is no valid trust in favor of Respondents. Absent a showing that Virginia law somehow infringed the denomination's ability to structure its polity in a legally cognizable fashion, see *Jones*, 443 U.S. at 606, the secular legal documents completely settle the dispute. This is the "neutral principles" approach at its best.

The Virginia Supreme Court's analysis, however, obligates courts to analyze the "articles of religious governance" and the "course of dealing" within the church. Pet. App. 18a, 21a. Thus, the property dispute no longer turns on legal documents; it turns on a court's interpretation of disputed church rules and the disputed "course of dealings" among religious entities. This is just the sort of "searching and therefore impermissible inquiry into church polity" forbidden by *Jones*. 443 U.S. at 605.

Here, the lower court conducted a 22-day bench trial with over 60 witnesses and reams of evidence on "the polity and administration of [the] church." *Ibid.* The parties offered conflicting testimony on the meaning and significance of particular church canons and religious practices. And the court received evidence on everything from the structure of the denomination's health insurance policies, to the text of

oaths taken by vestry members, to the type of hymnals and Sunday school materials used by the congregations, A138-39. As Justices Alito and Kagan put it, "the mere adjudication of such questions * * * pose[s] grave problems for religious autonomy: It * * * require[s] calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes." *Hosanna-Tabor*, 132 S. Ct. at 715 (Alito, J., concurring).

This is not to say that the lower court or others like it are acting out of ill motive. They are likely attempting to give churches the "special solicitude" guaranteed by the First Amendment. *Hosanna-Tabor*, 132 S. Ct. at 706. But that motive is misdirected in the context of applying ecclesiastical rules to church property disputes, because it creates *more* interference in internal church matters, not less. And that interference extends to both the churches that "win" in civil court and those that lose.

C. Giving special weight to ecclesiastical law unsettles private property rights.

The lower court's decision also unsettles private property rights. Until now, Virginia's property and trust rules were clear and well-settled: There must be an "*intention* [by the title-holder] to vest title" in a beneficiary, and the title-holder must "*convey*[] an[] interest" in the property. *Ogden* v. *Halliday*, 369 S.E.2d 417, 419-20 (1988); *Leonard* v. *Counts*, 272 S.E.2d 190, 194 (1980). Obviously, as in other states, one cannot declare oneself to be a beneficiary of a trust in someone else's property. Restatement (Second) of Trusts § 18 cmt. a (1959). Such rules provide

a clear framework for the creation and transfer of property interests. But under the lower court's decision, they would no longer apply to churches.

Instead, ordinary principles of property and trust law would be displaced by church canons and the "course of dealings" within the church. Churches could no longer have confidence that property ownership would be decided on the basis of the publicly recorded deeds, articles of incorporation, or other legal documents. Rather, churches would be uniquely unable to use legal instruments to dispose of their property in a clear and definitive fashion.

The consequences of such an approach would be significant, and often unjust. Making property ownership turn on church canons and the "course of dealings" between the parties would undermine both States' and churches' interests in clear property rights. If property ownership turns on canon law and church practice, potential purchasers or lenders can never know who precisely owns a given piece of property—until they examine all relevant church canons and historical precedents (perhaps after a 22-day trial).

Even if the deed were in the name of a local congregation, with no apparent encumbrances, the congregation would not necessarily be able to claim clean title; any title would be held subject to church law that may or may not be known to the local congregation, let alone third parties. Title insurance would be difficult or impossible for churches to obtain. Cf. *All Saints*, 685 S.E.2d at 168 (congregation unable to obtain title insurance). Lenders, buyers, and reviewing courts would have to determine what church canons might be on point and how

the church's "course of dealings" might affect the property interests in question. This would frustrate governmental and religious interests in predictable property rights. And it would inevitably draw courts further into the constitutional thicket. In effect, it would be a judicially-created cloud on the title of every church property.

Tort claimants might also be affected. Because the scope of recovery for tort claims often depends on who owns the property where the tort occurred, courts and juries would be forced to examine church canons and the "course of dealings" to determine ownership. And to make matters more complicated still, under the lower courts' holding, the denomination can always revise its canons whenever it chooses. Indeed, some churches might be influenced to rewrite canon law in order to avoid liability.

The lower court's rule thus invites a host of unnecessary troubles. Simply applying ordinary property and trust law obviates "the need for an analysis or examination of ecclesiastical polity or doctrine." *Jones*, 443 U.S. at 605. That is simple. That protects constitutional rights. And that is far preferable to a rule requiring courts to interpret and enforce ecclesiastical law.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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