IN THE SUPREME COURT OF VIRGINIA

Record No. 120919

THE FALLS CHURCH (ALSO KNOWN AS THE CHURCH AT THE FALLS—THE FALLS CHURCH),

Defendant-Appellant,

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA AND THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA,

Plaintiffs-Appellees.

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

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INTRODUCTION AND STATEMENT OF THE CASE

This case implicates a vital question of Virginia and federal Constitutional law: How should a court determine ownership of church property in the event of a schism? There are two competing answers.

Under the "neutral principles" approach outlined in *Jones* v. *Wolf*, 443 U.S. 595 (1979), churches are treated like other voluntary associations, and ownership of church property turns on ordinary principles of state property and contract law, as applied to the deeds, corporate charter, and civil legal documents. Church canons and internal church practices are analyzed in "purely secular terms," *id.* at 604, and are given effect only if they are "embodied in some legally cognizable form"—such as in the language of a deed, trust agreement, or contract. *Id.* at 606. This approach, as *Jones* said, "free[s] civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Id.* at 603.

The lower court, however, adopted a different rule. It held that special rules apply to churches, and ownership turns not primarily on ordinary principles of property law as applied to the deeds and corporate charters, but rather on church canons adopted unilaterally by the denomination at a national level two centuries after The Falls Church was established and its property deeded in the name of the local church, as well as the court's in-

terpretation of disputed testimony regarding the "course of dealings" between the congregation, the denomination, and other local and national Episcopalian entities. A128-145. To determine the ownership of church property, the court conducted a 22-day bench trial with over 60 witnesses, and heard extensive and conflicting testimony on the polity, administration, and practices of The Falls Church and the Episcopal Church. Based on this extensive inquiry, the Court held that the Plaintiff Episcopal Church had obtained a "contractual and proprietary interest," A145, in The Falls Church's property—despite the fact that The Falls Church has owned the property since colonial times, none of the deeds names the Episcopal Church as a grantee, and no contract has ever given the Episcopal Church any ownership interest in the property.

That result is not compelled by the law of this State, and in fact violates the First Amendment. First, it undermines the free exercise rights of churches by placing a thumb on the scale in favor of hierarchical denominations and subtly pressuring denominations toward a more hierarchical polity. Second, it entangles civil courts in forbidden questions of "religious doctrine, polity, and practice," *Jones*, 443 U.S. at 603, by making property rights turn on the court's interpretation of canon law and internal church dealings. As a result, the decision below creates an incentive for local

churches not to join a denominational body at all, lest their spiritual affiliation open the door for the denomination to claim legal rights in their property later on. Third, it harms the rights of third parties like lenders and tort claimants by rendering longstanding principles of State property law inoperative and potentially subjecting private property interests to a complex "course of internal church dealings" analysis, even when the recorded title is clear.

Virginia law and the First Amendment need not be thrust into conflict. A truly neutral approach to church property disputes—which requires courts to apply ordinary principles of contract and property law, and "to scrutinize the document[s] in purely secular terms"—will free courts from the danger of entanglement in church affairs and better protect religious liberty. *Jones*, 443 U.S. at 604. The judgment of the court below should be reversed.

INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. It has represented Buddhists, Christians, Hindus, Jews, Muslims, Native

[1] The Becket Fund files this brief pursuant to Virginia Supreme Court Rule 5:30(b)(2), which permits the filing of briefs *amicus curiae* without leave of court when the "filing is accompanied by the written consent of all counsel." Written consent of counsel is attached in an addendum to this brief.

Americans, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. In its practice, 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 free exercise of religion includes the right of religious associations to shape their ecclesiastical polities freely, The Becket Fund has consistently 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 religious organization. *See Hindu Temple Soc'y of N. Am.* v. *Supreme Court of N.Y.*, 335 F. Supp. 2d 369, 374 (E.D.N.Y. 2004). It has also represented hierarchical, synodical, and congregational churches in efforts to prevent government interference with the freedom to select ministers. *See Curay-Cramer* v. *Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 141 (3d Cir. 2006) (religion teacher at Roman Catholic school); *Hosanna-Tabor Evangelical Lutheran Church and Sch.* v. *EEOC*, 132 S. Ct. 694 (2012) (religion teacher and commissioned

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

minister at Lutheran school); *Int'l Mission Bd.* v. *Turner*, 977 So. 2d 582 (Fla. Dist. Ct. App. 2008) (Southern Baptist missionary).

The Becket Fund thus has an interest in this case not because it favors any particular party, religious organization, or type of polity, but because it seeks an interpretation of the First Amendment that will promote the maximum of religious liberty for all religious organizations, no matter what polity they choose. The Becket Fund is concerned that the trial court's decision—which found a denominational proprietary interest based on internal church canons and the "course of dealings" between the parties—entangles courts in religious questions and unjustly interferes with the ability of churches to control their polities.

ASSIGNMENTS OF ERROR

1. The trial court erred in enforcing canon law, rather than "principles of real property and contract law" used in all cases, to award plaintiffs a proprietary interest in The Falls Church's property and to extinguish The Falls Church's interest in such property, even though The Falls Church's own trustees held title and The Falls Church paid for, improved, and maintained the property. A13, 8/12/11 Br. 1-153; 9/16/11 Br. 1-76; 10/18/11 Br. 1-83; 8/12/11 Proposed Findings 1-40.

2. The trial court's award of The Falls Church's property to plaintiffs violates the Religion Clauses of the U.S. and Virginia Constitutions by enabling denominations to secure others' property by means available to no other Virginia entity. A13, 8/12/11 Br. 123-135; 10/18/11 Br. 71-75.

3. The trial court erred in finding that plaintiffs had proprietary interests in The Falls Church's real property acquired before 1904, when the legislature first referenced denominational approval of church property transfers. A13,

A9120-28, A9130-31, A9149-52.

4. The trial court erred in awarding plaintiffs The Falls Church's unconsecrated realty, which is exempt from plaintiffs' canons. A9132-35, A7066, A7195-98, A7284-88, A7669, A7778, A7874, A7950-52, A8012-14, A8467-69.

5. The trial court erred in awarding The Falls Church's personal property to plaintiffs—even though plaintiffs never had any control over The Falls Church's funds or their use, and The Falls Church's donors, for religious reasons, gave on the express condition that their gifts *not* be forwarded to plaintiffs—in violation of Va. Code §57-1 and the Religion Clauses of the U.S. and Virginia Constitutions. 8/12/11 Br. 102-14; 9/16/11 Br. 54-56; 10/18/11 Br. 64-70; 2/22/12 Br. 1-16.

6. The trial court erred in awarding plaintiffs more relief than sought, including funds given after The Falls Church disaffiliated and funds spent on maintenance, which plaintiffs stipulated The Falls Church should keep. 2/22/12 Br. 16-24.

STANDARD OF REVIEW

"The standard of review applicable to each of [The Falls Church's] assignments of error is *de novo*, for legal error." Falls Church Br. at 14 (quoting Diocese Opp. 2); *see also John Crane, Inc.* v. *Hardick*, 732 S.W.2d. 1, 2 (2012) (issues of law and mixed questions of law and fact are reviewed de novo).

ARGUMENT

I. *Jones* v. *Wolf* does not compel courts to prefer church canons over neutral property and contract laws.

The rule of *Jones* v. *Wolf* is simply stated: A State may select "any method" for settling church property disputes that it prefers, "so long as the

use of that method does not impair free-exercise rights or entangle the civil courts in matters of religious controversy." 443 U.S. at 608. For almost forty years, the State of Virginia has elected to settle church property disputes by applying "neutral principles of law, developed for use in all property disputes." *Norfolk Presbytery* v. *Bollinger*, 214 Va. 500, 504 (1974).

Under ordinary principles of Virginia property and contract law, *no association*—religious or secular—can transfer to itself a legal interest in the property of one of its members by its own unilateral declaration—even if the declaration is adopted by a majority vote of the entities that make up the association. Yet the court below held that the Episcopal Church successfully obtained ownership of The Falls Church's property based on internal church canons and the "course of dealings" between the parties—despite the fact that those canons and dealings had never been embodied in any legally cognizable form, and that official Episcopal Church commentary recognized that the canons were not legally binding. A128-145; A2218 ("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."). This ruling was mistaken. Neither *Jones* nor this Court's decisions in *Norfolk* or *Green* require courts to give legal force to church canons in contravention of standard principles of property and contract law.

A. Under *Jones*, States may apply civil property and contract law to resolve church property disputes, as long as courts do not decide religious questions and churches are permitted to express their polity in a legally cognizable form.

Under *Jones*, a State has considerable discretion to select a process for settling church property disputes, subject to only two constitutional limitations. First, civil courts may not "resolv[e] church property disputes on the basis of religious doctrine and practice." 443 U.S. at 602. Second, State law must give churches the ability to adopt the form of church government or polity that they want. *Id*. at 606. That means, among other things, that the rules a State adopts for resolving church property disputes must be default rules that churches can work around. *Id*. at 607. So, for example, if the State adopts the rule that a majority of a congregation's members represents the congregation in a property conflict, the State must give the church a "method of overcoming the majoritarian presumption . . . [that] does not impair free-exercise rights." *Id*. at 608. Should the State make it unduly burdensome to work around its default rules, by, say, forcing the church to pay draconian taxes, the State's rules will be unconstitutional.

These constitutional requirements are important, but not onerous. *Id.* at 606 (characterizing the burden of complying with civil law as "minimal"). Beyond them, "the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes," *id*. at 602,

let alone that it must defer to the denomination's unilateral declaration, through church canons adopted in the 1970s and 80s, of a supervening right to property previously purchased by local congregants and deeded in the name of the local church.

The lower court's conclusion that it was legally obligated to recognize a property interest based on later-adopted church canons and the "course of dealings" between the parties finds no support in *Jones*. *See* A88-89. Although *Jones* suggests that church canons might be relevant, they are enforceable *only* if they are "embodied in some legally cognizable form," 443 U.S. at 606—in other words, only if they meet the ordinary criteria for creation of a proprietary or contractual interest under "objective, well-established concepts of trust and property law familiar to lawyers and judges." *Id.* at 603. To determine whether church canons meet those criteria, courts must "scrutinize the [church] document in purely secular terms, and not . . . rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust." *Id*. at 604. This is the essence of the neutral principles approach: The civil law "developed for use in *all* property disputes" is applied to the dispute between the religious organizations. *Norfolk*, 214 Va. at 504 (quoting *Presbyterian Church in U.S.*

v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church* (*Presbyterian Church I*), 393 U.S. 440, 449 (1969) (emphasis added)).

To be sure, courts must defer to church canons on matters that are genuinely "issues of religious doctrine or polity." *Jones*, 443 U.S. at 602. But the existence (or nonexistence) of a proprietary interest is not in this category. Typical questions of doctrine and polity include whether a denomination has departed from its previous theological commitments, see *Presbyterian Church I*, 393 U.S. at 442-443, or whether certain church figures are entitled to hold sacred offices, see *Serbian E. Orthodox Diocese for U.S. and Can.* v. *Milivojevich*, 426 U.S. 696 (1976). Such questions are intimately bound up with the specific beliefs and internal structure of the organization as a *religious* organization.

States have no legitimate interest in "internal church decision[s] that affects the faith and mission of the church itself." *Hosanna-Tabor*, 132 S. Ct. at 707. And even if States did have an interest in such purely theological disputes, they "do not have the competence" to resolve them. *Milivojevich*, 426 U.S. at 714 n.8. As a result, the Supreme Court has repeatedly held that civil courts "must defer to the resolution of . . . doctrinal issue[s] by the [church's] authoritative ecclesiastical body." *Jones*, 443 U.S. at 604 (*citing*

Milivojevich, 426 U.S. at 709); *see also Presbyterian Church I*, 393 U.S. at 449.

But property disputes are not doctrinal disputes, and the State *does* have an interest in the rules governing property. In the words of *Jones*, the State is obligated to provide for "the peaceful resolution of property" conflicts of all kinds. 443 U.S. at 602. That means the State has an interest both in providing "a civil forum" where the ownership of property, including "church property[,] can be determined conclusively," and in ensuring that churches define their property rights in "legally cognizable" terms recognized in civil law. *Id*. at 602, 606. Property purchasers, financial lenders, tort claimants, and other parties need to be able to rely on the basic property instruments that indicate who owns the property. And donors and participants in local churches need to be able to make their gifts of time and money to entities that embody their beliefs, without fear that the fruits will later be appropriated by a different body, without their consent. *See Presbyterian Church I*, 393 U.S. at 449 ("States, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.").

Both the Supreme Court and other state courts have recognized the distinction between property and contract law on the one hand, which may be

interpreted in light of neutral principles of civil law, and issues of doctrine and polity, which are not proper subjects of judicial determination. In *Milivojevich,* for example, contending parties claimed control of a Russian Orthodox diocese and its property. The questions of civil property law in that case were undisputed: The property was vested in the legal title holder named in the deed, and the deed named the Diocesan Bishop. *See* 426 U.S. at 709. The issue was who had the ecclesiastical authority to control the appointment of the bishop. *See id.* As the Supreme Court explained, the case thus involved "not a church property dispute, but a religious dispute." *Id.* Consequently, it could be resolved only by "the final church judicatory in which authority to make the decision resides." *Id.* at 720. The Court decided the case by following the express civil terms of the property deed, deferring to religious authorities only with respect to the religious question of who was the bishop.

Similarly, in *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 96 n.1 (1952), there was "no problem of title," which all parties recognized was vested in a religious holding corporation. The question was whether a State law could dictate which church authority—the Moscow Patriarch or a North American convention—"validly selects the ruling hierarch" for the corporation. *Id.* at 96-97. This question,

the Court concluded, was "strictly a matter of ecclesiastical government" and beyond the power of a civil court to enforce. *Id.* at 115. Courts in other states have similarly recognized the distinction between doctrinal disputes and disputes resolvable at civil law.[3]

This property dispute can be resolved without interfering in ecclesiastical government. Neither the identity of the denomination's bishops, nor the structure of its dioceses, nor its right to refuse recognition to The Falls Church as a departing congregation is at issue. The Episcopal Church remains free to exclude The Falls Church and its clergy from its spiritual fellowship, and to refuse to recognize them as fellow Episcopalians. *Jones* instructs that where "no issue of doctrinal controversy is involved . . . the First

[3] *See, e.g., All Saints Parish Waccamaw* v. *Protestant Episcopal Church in Diocese of S.C.*, 685 S.E.2d 163, 172 (S.C. 2009) (distinguishing civil law disputes over church property, in which deference to hierarchy is not required, from disputes over "religious law or doctrine," in which courts "must defer to the decisions of the proper church judicatories"); *Presbytery of Beaver-Butler of United Presbyterian Church in U.S.* v. *Middlesex Presbyterian Church*, 489 A.2d 1317, 1320-21 (Pa. 1985) ("[D]isputes . . . as to the meaning of agreements on wills, trusts, contracts, and property ownership are questions of civil law . . . and can be solved . . . without intruding into the sacred precincts."). *See also* Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 Colum. L. Rev. 1843, 1859 (1998) ("In *Jones* v. *Wolf*, . . . the Court indicated that civil courts need not defer to higher church authorities if they instead rely on authoritative documents that can be interpreted without invoking religious understandings.").

Amendment [does not] require[] the States to adopt a rule of compulsory deference." 443 U.S. at 605. That is this case.

B. Applying neutral property and contract laws under *Norfolk* and *Green* meets the *Jones* requirements.

Virginia property and contract law satisfies both of the constitutional requirements recognized in *Jones*: Virginia property and contract law prevents courts from becoming entangled in doctrinal disputes, and it provides churches with flexibility to embody their church structure in legally cognizable form. The denomination's free exercise rights are thus amply protected without the need for civil courts to parse church canons or examine the "course of dealings" within the church.

First, applying Virginia's property and contract law guarantees that civil courts are not entangled in religious questions. Virginia property and contract laws, and the cases interpreting them, were developed independently of any church polity or doctrine "for use in all property disputes." *Norfolk*, 214 Va. at 504 (quoting *Presbyterian Church I*, 393 U.S. at 449).[4] In brief, these laws forbid express or implied denominational trusts, *Norfolk*, 214 Va. at 507; disfavor restrictive covenants absent clear language to the contrary,

[4] Like other states, Virginia has adopted specific statutes relevant to the disposition of church property in defined situations. See, e.g., Va. Code §§ 57-7.1, 57-9, 57-15, and 57-16.1. But as the lower court rightly found, none of those statutes is controlling here. A92-105.

Scott v. *Walker*, 274 Va. 209, 213 (2007); and require mutual assent, consideration, and mutual remedies to form a contract, Falls Church Br. 23-30. These rules apply to all persons seeking to create proprietary or contractual interests in the State of Virginia. Consequently, courts need not trouble themselves with examining a church's internal ecclesiastical structure or practice—let alone its doctrinal beliefs. Instead, civil courts can do their judicial duty by determining whether the "statutes," "the express language in the deeds," "the charters of the local church corporations," and "the constitution of the general church" contain the requisite elements of a proprietary or contractual interest under Virginia law. *Norfolk*, 214 Va. at 505 (citing *Md. & Va. Eldership of Churches of God*, 396 U.S. 367 (1970)).

Second, Virginia property and contract law permits churches to adopt the form of polity they desire and embody it in legally cognizable ways. For example, while Virginia's property rules require a clear expression of intent to create a restrictive covenant, *Scott*, 274 Va. at 213, there are multiple ways a national denomination can comply with that rule and exercise control of local church property. The denomination could require its member-churches to insert use restrictions or reverter clauses in their property deeds—as numerous denominations in Virginia already do, and as the Episcopal Church has done for congregations *other* than The Falls Church.

Falls Church Br. 17-18. Or it could simply require local churches to place title in the name of the bishop—as the Roman Catholic Church did in the Nineteenth Century and the Episcopal Church has done twenty-nine times for other properties within the Diocese. In any of these ways, and no doubt others, Virginia law enables a denomination to embody its chosen polity in a legally cognizable form. *See Jones,* 443 U.S. at 606 (recognizing the burden to comply with civil law as "minimal").

But the Episcopal Church did not seek to establish a proprietary or contractual interest in The Falls Church's property in any of these ways. Instead, without actually seeking to create a proprietary or contractual interest in accordance with Virginia law, it amended its canons to unilaterally declare a "trust" in The Falls Church's property. Now the Episcopal Church claims that civil courts are bound to give legal effect to its internal ecclesiastical canons. But as the Episcopal Church's own commentary recognized, if the Episcopal Church wished to make its ecclesiastical canons legally enforceable, it needed to follow Virginia law. A2218 ("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."). Its failure to do so does not render Virginia's laws constitutionally defective. It

simply means that there is no proprietary or contractual interest in The Falls Church's property.

This result is hardly anomalous. At least six state supreme courts and the Eighth Circuit have reached this result under analogous circumstances, concluding that denominational rules create an interest in local church property only if those rules are embodied in a legally cognizable form as required by state law.[5]

The South Carolina Supreme Court's decision in *All Saints* is illustrative. There, as here, the deed provided that title to the property was held by the local congregation. 685 S.E.2d at 173-4. Nevertheless, the Episcopal Church argued that denominational canons created a trust, vesting equitable title in the denomination. *Id.* at 174. Applying neutral principles of South Carolina trust law, the court unanimously rejected that argument: It is "axiomatic," the court held, that "a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another." *Id*. Thus,

[5] *Presbytery of Ohio Valley* v. *OPC, Inc.*, 973 N.E. 2d 1099, 1106-07 & n.7 (Ind. 2012); *All Saints,* 685 S.E.2d at 163; *Ark. Presbytery* v. *Hudson*, 344 Ark. 332 (2001); *Church of God in Christ, Inc.* v. *Graham*, 54 F.3d 522 (8th Cir. 1995) (Missouri law); *Berthiaume* v. *McCormack*, 153 N.H. 239 (2006); *St. Paul Church, Inc.* v. *Bd. of Trustees of Ala. Missionary Conf. of United Methodist Church, Inc.*, 145 P.3d 541 (Alaska 2006); *In re Church of St. James the Less*, 585 Pa. 428 (Pa. 2005).

because the Episcopal Church never held title to the property, the church canons "had no legal effect on the title to the congregation's property." *Id*.

So too here. Absent a use restriction in the deeds of the type found in many of the other churches that were party to this lawsuit, or a contract formed in compliance with Virginia law, the Episcopal Church's canons and the parties' "course of dealings" have no legal effect. *See, e.g.,* A2218. Of course, church canons may create a religious obligation, enforceable through religious sanctions, on Episcopal congregations to amend their property instruments in favor of the denomination. But civil courts do not enforce "the ecclesiastical law of the general church." *Norfolk*, 214 Va. at 503. Unless and until the owner of the church property conveys a proprietary or contractual interest to the denomination, there is no legal interest for a civil court to enforce.

II. Enforcing Virginia's neutral property and contract laws is constitutionally preferable to a regime of unilateral denominational interests.

Applying Virginia's property and contract laws to resolve the present property dispute is not only constitutionally permissible, it is constitutionally required.

According to the lower court, because the Episcopal Church is a "hierarchical" denomination, its "control, supervision, and authority" over spiritual

matters also extend "to matters related to property." A136. In other words, even if the deeds and ordinary principles of property and contract law indicate that the property is owned by the local congregation, the denomination can still have a proprietary or contractual interest based on "the governing laws of the church" and the "course of dealings" between the parties. A88-89. But that is not a "neutral" principle in the sense of *Jones* and *Norfolk*; it tilts the laws of property and contract in favor of hierarchies and denominations, at the expense of local congregations and intermediate forms of church organization.

Adopting the lower courts' rule of unilateral denominational interests contradicts both of the key principles in *Jones*. First, it interferes with the freedom of churches to choose their own 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. Beyond these two problems, it also confuses property rights by nullifying standard principles of property and contract law. Accordingly, the lower court's approach cannot be squared with the First Amendment.

A. A unilateral denominational interest rule undermines free exercise.

Virginia law distinguishes between "congregational" and "hierarchical" churches for the limited purpose of determining whether a

supercongregational body has "standing to object to [a congregation's] property transfer." *Norfolk*, 214 Va. at 503 (discussing Va. Code § 57-15). In the case of a hierarchical church, the denomination has the right, within the framework of "neutral principles of law," "to present whatever evidence it ha[s] tending to establish its interest in the [local congregation's] property." *Id.* at 504, 503. "If [the denomination] is unable to establish a proprietary interest," it "will have no standing to object to [any] property transfer" by the congregation under Va. Code §57-15. *Id*. at 503. But the court below used the congregational–hierarchical distinction in a different way: not just to establish the denomination's right to present *evidence* of a proprietary interest, but to demonstrate the *existence* of a proprietary interest.[6]

That approach is fundamentally at odds with First Amendment principles. First, it assumes that all churches are either "congregational" or "hierarchical," and that "hierarchical" churches necessarily are entitled to centralized control over church property. But in the real world, not all churches are purely "congregational" or "hierarchical," and a church's governing structure may offer little insight into how it intends to hold its property. Second, this assumption pressures denominations toward a more "hierar-

[6] *See* Falls Church Br. at 15 (noting that the opinion below referred to the Episcopal Church's hierarchal nature at least 35 times).

chical" form of church government, directly contradicting the First Amendment rule that churches remain free "to decide for themselves, free from state interference, matters of church government." *Kedroff*, 344 U.S. at 116.

By contrast, the best constitutional approach to adjudicating church property disputes is not to place a thumb on the scale in favor of denominational authority, but simply to apply the State's civil property and contract law. That law enables congregations and denominations to vest control of property however they think appropriate, with confidence that courts will enforce the deed as written, instead of trolling through ambiguous church documents and practices to determine who the court believes has a right to the property. It gives effect to any legally cognizable agreement between the denomination and its local congregations, while "obviat[ing] entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes." *Jones*, 443 U.S. at 605.

1. The lower court's decision ignores the diversity of American religious associations.

In the religiously diverse American context, many religious associations are neither "congregational" nor "hierarchical," and it is no easy task for a court to determine where along the spectrum a given church lies. *See id*. at 605-06 (noting that in many cases church government is "ambiguous"). The

"hierarchical" label best fits the Roman Catholic Church, where local parishes are subject to strict and descending levels of authority—from the Pope, to diocesan bishops, and then to priests. As a Stipulation in this case confirms, "[t]itle to the real property of parishes (local congregations) in Virginia attached to the Roman Catholic Church is held in the name of the Bishop of the Diocese in which the parishes are located." A4304.

At the other end of the polity spectrum, Quakers and independent Baptists exemplify the classic "congregational" model. As the U.S. Supreme Court recognized in *Watson* v. *Jones*, 80 U.S. 679, 722 (1871), these groups are "strictly independent of other ecclesiastical associations." There are no religious bodies connecting individual congregations to each other. They recognize no ecclesiastical head or authority outside of the congregation.

But many religious polities fall somewhere between the two, or change over time, and *Jones* teaches that the dichotomous distinction is not dispositive. 443 U.S. at 607 (recognizing the Presbyterian denomination in that case as a "hierarchical church" yet remanding for an evaluation of property ownership under neutral principles of state law). Familiar examples include "mainline" Protestant denominations such as Methodists, Presbyterians, and Lutherans. The Evangelical Lutheran Church in Ameri-

ca ("ELCA") emphasizes that it is organized neither as a hierarchical church in the Roman Catholic tradition nor as a congregational church in the Anabaptist tradition, but as a church in which all levels are "*interdependent* partners sharing responsibility in God's mission." ELCA Constitution, Ch. 5 (Principles of Organization), § 5.01(emphasis added).

Or take the Presbyterian Church (U.S.A.) ("PC(USA)"). It has multiple levels of governance. Individual congregations are governed directly by a "Session," which consists of the pastor and congregationally elected elders. The Session in turn sends delegates to a regional Presbytery; the Presbytery sends delegates to a Synod; and the Synod sends delegates to the nationwide General Assembly. Despite this multi-tiered structure, the highest adjudicative body in the PC(USA) has emphasized that the church's structure "*must not be understood in hierarchical terms*, but in light of the shared responsibility and power at the heart of Presbyterian order."[7]

Moreover, 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 PC(USA) includes in its constitution a provision stating that all property of local congregations is

[7] *Johnston* v. *Heartland Presbytery*, Permanent Judicial Comm'n Remedial Case 217-2, 7 (2004) (emphasis added) *available at* http://oga.pcusa.org/media/uploads/oga/pdf/pjc21702.pdf.

held in trust for the denomination.[8] But the Presbyterian Church in America ("PCA"), with an ecclesial structure virtually identical to that of the PC(USA), affirms just the opposite: local churches retain their properties if they leave.[9] 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 religious organizations, 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. Ebaugh &

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[8] *See The Book of Order: The Constitution of the Presbyterian Church (U.S.A.)* Part II, § G-4.0302 (2011/2013) ("All property held by or for a particular [i.e. local] church, . . . is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.).").

[9] *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, General Assembly or any other courts hereafter created, trustees or other officers of such courts.").

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 or "gurdwaras" not arranged in either a "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).

And regardless of how a religious organization is formally structured, it is virtually impossible to discern church polity from formal ecclesial structure alone. To understand how a church is really governed, one must be intimately familiar not merely with documents such as the church constitution, canons, and bylaws, but also with the history of those laws in operation. 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 hortatory but widely ignored in practice; some are purely aspirational; some are adopted without the agreement of a large minority of local congregations or individual members and may not reflect the desires of those con-

stituencies. In short, the true nature of a church's polity is a complex, nuanced factual question that civil courts are ill-equipped to resolve.

2. The lower court's decision gave improper weight to the Episcopal Church's internal rules.

The lower court's analysis ignores all this. In bullet-point fashion, it lists "50 references to the Constitution and Canons" of the Episcopal Church, purporting to find that they provide "compelling evidence that [the Episcopal Church] is a hierarchical church" and that the denomination must therefore exercise "control, supervision, and authority [over] matters related to property"—regardless of the Episcopal Church's recognition, in the official commentary to its canons, that its "power . . . over the disposition of real property is questionable" (A2218), and regardless of any contrary indication in the property deeds of *The Falls Church*, which have never included a use restriction or other statement that the property was subject to the Episcopal Church's control. *See* A135-136.

But this unilateral denominational interest rule effectively prevents churches from adopting certain forms of government. For example, the rule would undermine polities like the PCA's, which combines ascending levels of ecclesiastical authority with a constitutional provision guaranteeing local control of property in the event of a division. *See supra* pp. 23-25 & nn.8, 9. Under the lower courts' unilateral denominational interest rule, that consti-

tutional provision is in no way binding. If at some point in the future the PCA's General Assembly reversed course and, contrary to the will of many or even most of its congregations and their individual members, amended its constitution to assert that the denomination had a legal interest in all local property, the lower court's rule would leave local congregations no recourse.[10] That is, even if the PCA fully intends *ex ante* to give local congregations ultimate control over their property, and existing local congregations join or remain within the denomination on that basis, the lower court's rule makes it impossible for the PCA to make that aspect of "congregational" governance binding on itself.

Indeed, there is evidence that this is exactly what happened here. *See* Falls Church Br. at 7 & n.1; 41-43. The year that The Falls Church joined the denomination, the Diocese adopted a canon providing that "[t]he Vestries respectively, with the Minister, when there is one, shall hold all glebes, lands, parsonage houses, churches, books, plate, or other property now belonging or hereafter accruing to the Protestant Episcopal Churches of the Diocese of Virginia, as trustees for the benefit of the congregation of said

[10] This scenario is not merely hypothetical. In *Comm'n of Holy Hill Cmty. Church* v. *Bang*, No. B184856, 2007 WL 1180453, at *1 (Cal. Ct. App. 2007), the PCA denomination attempted to control the property of a breakaway congregation, notwithstanding the denomination's constitutional commitment to local property control.

church[.]" A5912-a. 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 (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. Thus, this case presents an example of a denomination whose internal rules regarding property ownership shifted over time. In the lower court's hands, such rules become a one-way ratchet, enabling national church bodies to substitute more centralized and hierarchical forms of government. Under the lower court's approach, all centralized and hierarchical aspects of church polity must be enforced as a matter of state law, while any congregational elements may be canceled by a denominational body unilaterally and at a moment's notice.

The Supreme Court has said time and again that religious organizations have a constitutional right to govern their own affairs, "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116; *accord Presbyterian Church I*, 393 U.S. at 447-448 (affirming *Kedroff*); *Hosanna-Tabor*, 132 S. Ct. at 704-06. The lower court's approach violates those constitutional

prerogatives by giving legal effect to the Episcopal Church's unilaterally-adopted modifications of its internal rules in lieu of enforcing the legal instruments adopted at the time that contributions were made and property purchased.

It is no answer to say that the canons in this case were not "unilateral" because The Falls Church, like all Episcopal parishes, was entitled to participate in the processes that led to their adoption. As The Falls Church explained in its brief, it has existed as a legally distinct entity since 1732, and there is no evidence that it ever ceded its authority over property to the Episcopal Church. *See* Falls Church Br. at 7 & n.1. It is a basic principle of associational law that an association may "not deprive [its] member of vested property rights without the member's explicit consent." *In re Church of St. James the Less*, 585 Pa. at 448 (ruling in favor of the denomination where the local church's charter promised to hold the property in trust for the local diocese); *see also* 6 Am. Jur. 2d, Associations and Clubs § 5 ("by-laws or rules cannot be enforced when they compel a citizen to lose his or her rights in accumulated assets").

Virginia law does not even permit voluntary associations to encumber members' property by passing rules, much less assert an ownership interest in it. *See Unit Owners Ass'n* v. *Gillman*, 223 Va. 752, 765 (1982) (rejec-

ting as unlawful a heavy fine levied by a voluntary association in order to "punish[]" a member and "encumber" the member's property). For the reasons we have explained above, any rule that had the effect of depriving voluntary *religious* associations of the protection of these basic principles of association law would likely be unconstitutional. But that is exactly the kind of rule that the Episcopal Church is asking this Court to adopt here.

The best way to protect the rights of *all* churches and religious associations is not to enforce deference to this or that denominational (or congregational) body, but to apply the State's neutral property and contract laws, relying on churches to translate their chosen polity into a "legally cognizable form." *Jones*, 443 U.S. at 606. That way, churches may adopt whatever form of polity they wish. And courts have no need to investigate the intricacies of church governance.

There is no reason to think the First Amendment places a thumb on the scales in favor of a particular form of church government, hierarchical or any other. A genuinely neutral principles approach, based on the State's ordinary civil laws, allows churches and denominations to choose the polity *they* prefer, not the courts. In this case, the trustees of The Falls Church decided not to place title in the hands of a denominational official or subject

the property to the authority of the Episcopal Church. That is a decision that the First Amendment requires this Court to respect.

B. A unilateral denominational interest rule invites entanglement by forcing civil courts to apply church law.

The *Jones* Court endorsed the neutral principles approach as a constitutional method for resolving ecclesiastical property disputes 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. The lower court's rule reintroduces precisely the entanglement *Jones* sought to avoid.

In any given church property dispute, there will typically be (at least) three types of ownership evidence: (1) legal documents, such as the deed, corporate charter, State laws governing trusts, and any formal contracts or trust agreements; (2) church governance documents, such as the church constitution and canons; and (3) evidence of church practice, such as who typically controls local property and how the church constitution and canons are applied in practice. *See* Greenawalt, *supra* p. 13 n.3, at 1886 (listing possibilities).

When State property and contract law is used to settle church disputes, cases can be resolved in a predictable way 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 property law demonstrates that there is no valid use restriction in favor of the denomination. Falls Church Br. at 16-22. Similarly, a straightforward application of Virginia contract law demonstrates that there is was no mutual assent, consideration, or mutual remedy to grant the denomination a contractual interest in the property. *Id.* at 24-30. This is the "neutral principles" approach at its best.

The lower court's attempt to discern unwritten church practice and to enforce church canons unilaterally adopted at the denominational level, by contrast, obligates courts to delve deeply into church canons and the "course of dealing" between the parties. A128-145. Thus the property dispute no longer turns on legal documents; it turns on a court's interpretation of church law, disputed testimony, and a court's interpretation of the "course of dealings" among religious entities. This approach poses serious entanglement problems, for the reasons highlighted in *Jones*: "Under [an] approach of [denominational deference], civil courts would always be required to examine the polity and administration of a church . . . ." 443 U.S. at 605. In some cases, of course, "this task would not prove to be difficult." *Id*. But in others, "[a] careful examination of the constitutions of the general and local church, as well as other relevant documents, [would] be neces-

sary to ascertain the form of governance adopted by the members of the religious association." *Id*. (internal quotations omitted). In those cases, "the suggested rule would appear to require a searching and therefore impermissible inquiry into church polity." *Id*. (internal quotations omitted). This case is a perfect example. 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." *Id.* 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, A138-139—precisely the sort of analysis of "the polity and administration of a church" forbidden by *Jones*. 443 U.S. at 605.

The rule of unilateral denominational interest the lower court applied would embroil Virginia courts in these fact-intensive inquiries regarding church polity and administration on a regular basis. That is an invitation to entanglement this Court should decline—both because it interferes with the religious liberty of churches and denominations, and because, as explained below, it creates uncertainty in the law and unsettles private property interests generally.

C. A unilateral denominational interest rule would render longstanding principles of property and contract law inoperative and unsettle private property interests.

Virginia's property and contract rules are clear and well-settled: denominational trusts are forbidden, *Norfolk*, 214 Va. at 507; restrictive covenants are disfavored absent clear language to the contrary, *Scott*, 274 Va. at 213; and contracts require mutual assent, consideration, and mutual remedies to be enforceable, Falls Church Br. 23-30. These rules provide a clear framework for the creation and transfer of proprietary and contractual interests. But the lower court's rule of unilateral denominational interests would upend it and uniquely deprive religious bodies of the freedom to contract on the same grounds as every other entity in Virginia.

According to that rule, the neutral principles of property and contract would be displaced by church canons and the "course of dealings" within the church, at least when it comes to church property. Going forward, churches could no longer have confidence that future property ownership would be decided on the basis of the publicly recorded deeds, articles of incorporation, or other fundamental elements of property law. Rather, churches would be uniquely unable to use legal instruments to dispose of their property in a clear and definitive fashion. In this case, for example, the lower court's analysis would force the State of Virginia to discard

longstanding principles of property and contract law and give legal effect to a *unilateral declaration* of interest by a denomination—without recording that interest in any deed or embodying that interest in any contract.

The consequences of such an approach would be significant, and often unjust. Making property ownership turn on church canons and a trial court's impressions of the "course of dealings" between the parties to a division would undermine Virginia's property law regime and frustrate both the State's 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 with the benefit of a 22-day bench 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 clear title; any title would potentially be held subject to church law that may or may not be known to the local congregation, let alone third parties who must determine ownership. Title insurance would be difficult or impossible for churches to obtain. *Cf. All Saints*, 385 S.C. at 438 (congregation unable to obtain title insurance). Lenders, buyers, and reviewing courts would *always* face the burden of determining 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 the significant governmental, societal, and religious interests in predictability of property rights. And it would inevitably draw courts further into the constitutional thicket.

Even tort claimants might be affected. The available scope of recovery for tort claims often depends on who exactly owns the property on which the tort occurred. If church property rights turned on internal church canons and practices, courts and juries would be forced to examine, interpret, and apply those canons and practices to determine whether the congregation or the denomination owned the property. *Cf. Jones*, 443 U.S. at 603 (instructing courts adjudicating church property disputes to rely on "objective, well-established concepts of trust and property law familiar to lawyers and judges"). And to make matters more complicated still, under the lower courts' holding, the denomination may always revise its canons, at any time it chooses. Indeed, some churches might be influenced to rewrite canon law in order to avoid liability.

The lower court's rule of unilateral denomination interest invites a host of troubles, all of which are unnecessary. Simply applying Virginia property law as it is written 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 constitutionally far preferable to a rule enmeshing courts in the onerous business of interpreting ecclesiastical rules.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court should be reversed.

Respectfully submitted,

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December 12, 2012

CERTIFICATE

I hereby certify that this brief complies with Virginia Supreme Court Rule 5:26 in the following respects:

On the 12th day of December, 2012 fifteen printed copies of the foregoing brief were filed by hand with the Clerk of the Court. An exact electronic copy in PDF was also tendered to the Court.

The word count of the foregoing brief is 8, 241.

The brief has been signed by counsel.

Three printed copies and one electronic copy of the brief were sent via overnight mail to the following counsel of record:

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ADDENDUM

From: Somerville, George A. [mailto:george.somerville@troutmansanders.com]
Sent: Friday, November 09, 2012 4:35 PM
To: Johnson, Steffen N.
Cc: Coffee, Gordon A.; Kostel, Mary E.; Beers, David B.; Davenport, Brad; Starnes, Tom
Subject: RE: Request for Consent to File Amicus Brief in Record No. 120919 (The Falls Church v. The Protestant Episcopal Church in the United States of America and The Protestant Episcopal Church in the Diocese of Virginia
Importance: High

Thanks, Steffen. The Diocese and TEC agree to your proposal, provided it is with the mutual understanding that your consent applies to Tom Starnes' *amicus* filing today as well as to briefs on the merits.

I'm indifferent to the mechanics. I see no need to file blanket consent letters, but neither do I object to it. The essential agenda item right now is for you to advise Tom that you consent to his filing today, so he can get it in without having to file a motion.

Thanks.

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Click **here** for my vCard

"I feel sorry for the person who can't get genuinely excited about his work. Not only will he never be satisfied, but he will never achieve anything worthwhile." - Walter Chrysler

From: Johnson, Steffen N. [mailto:SJohnson@winston.com]
Sent: Friday, November 09, 2012 3:34 PM
To: Somerville, George A.; Kostel2, Mary E.
Cc: Coffee, Gordon A.
Subject: FW: Request for Consent to File Amicus Brief in Record No. 120919 (The Falls Church v. The Protestant Episcopal Church in the United States of America and The Protestant Episcopal Church in the Diocese of Virginia

George, Mary:

Are you amenable to an arrangement where we consent to amicus filings on behalf of TEC and the Diocese, and you consent to amicus filings on behalf of The Falls Church, in the Virginia Supreme Court? We could file blanket consent letters with the Court if you like.

Steffen

From: Starnes, Thomas E. [mailto:Thomas.Starnes@dbr.com]
Sent: Friday, November 09, 2012 2:00 PM
To: Johnson, Steffen N.; Schaerr, Gene; Somerville, George A.; sjw@gg-law.com; Davenport, Brad (brad.davenport@troutmansanders.com); tro@gg-law.com; jjohnson@semmes.com; pfarquharson@semmes.com; EGetchell@oag.state.va.us; Kostel, Mary E. (mkostel@goodwinprocter.com); Beers, David Booth; Nichols, Andrew C.; tprout@semmes.com
Cc: Coleman, Brian A.; Plante, Claire M.
Subject: RE: Request for Consent to File Amicus Brief in Record No. 120919 (The Falls Church v. The Protestant Episcopal Church in the United States of America and The Protestant Episcopal Church in the Diocese of Virginia

Counsel,

I have not heard from any Appellants yet (one way or the other), but am writing to include the Abingdon Presbytery of the Presbyterian Church (USA) in the group that seeks your clients' consent to the filing of a brief as *amici curiae* in support of the Appellees' petition for rehearing.

Thank you.

Tom Starnes

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Cc: Coleman, Brian A.; Plante, Claire M.
Subject: Request for Consent to File Amicus Brief in Record No. 120919 (The Falls Church v. The Protestant Episcopal Church in the United States of America and The Protestant Episcopal Church in the Diocese of Virginia

Counsel,

I am writing to seek the consent of your clients to the filing today of a brief by the follow *amici curiae* in support of the Petition for Rehearing that Appellees' have filed today in the above-referenced appeal: *The Episcopal Diocese* of Southern Virginia, *The Episcopal Diocese* of Southwestern Virginia, the *General Council on Finance and Administration of The United Methodist Church, The Rt. Rev.* Young Jin Cho *(Bishop, Virginia Annual Conference of The*

United Methodist Church); Steven D. Brown (Chancellor, Virginia Annual Conference of The United Methodist Church). Please let me know by return email if your client so consents.

Best regards,

Tom Starnes

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