No. 11-1139

In the Supreme Court of the United States

RONALD S. GAUSS, *ET AL.*, PETITIONERS

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA, *ET AL.*, RESPONDENTS

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

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondents do not dispute that the legal issue in this case is of critical importance to millions of Americans in Protestant churches, or its significance to the stability of civil property rights and religious liberty. Indeed, respondents themselves have sought certiorari on this very issue when their side did not prevail. Yet for purposes of defeating certiorari here, they strenuously insist that the Connecticut Supreme Court's decision rested on state grounds rather than federal constitutional law. That is manifestly not so.

If the decision below had rested on state law, one would expect it to contain *some* discussion of state-law precedents or statutes governing "trust and property law." *Jones*, 443 U.S. at 603. Yet one searches the opinion—including respondents' lengthy excerpt (Opp. 7-9)—in vain for any such analysis.

Instead, the Connecticut court found an "express trust interest" in favor of respondents only because it read *Jones* to require as much. In the court's own words: "*Jones* * * * 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." Pet. 42a-43a. The court thus went on to hold that petitioners' "special defenses are *no longer relevant, and we need not address them*." Pet. 49a (emphasis added). Indeed, the court went still further, holding that *Jones* required excluding evidence that petitioners never agreed to grant respondents a trust: "the subjective intent and personal beliefs of the parties, including those of the donors are, according to *Jones*, irrelevant." Pet. 39a-40a.

This analysis is indisputably based on federal constitutional law. But the Court need not take our word for it. In a court *in another State*, respondent TEC trumpeted that "the Supreme Court of Connecticut * * * opined that *Jones* v. *Wolf requires* finding a provision in a hierarchical church's governing documents to be 'legally cognizable' 'as long as the provision was enacted *before* the dispute occurred.'"[1]

Once this becomes clear, nothing remains of respondents' opposition. They can ignore the well-entrenched split in the lower courts only by pulling isolated facts out of context and ignoring the courts' competing legal frameworks. To be sure, courts deciding these cases often consider whether the congregation agreed to the denomination's rules. But some courts ask whether those rules would satisfy "objective, well-established concepts of trust and property law" that are "developed for use in all property disputes." *Jones*, 443 U.S. at 599, 603 (citation omitted). Others, like the court below, find such analysis foreclosed by *Jones*.

Respondents do not deny that, if religious denominations have a constitutional right to transfer beneficial ownership of church property in all 50 States simply by passing church rules, that will greatly discourage denominational affiliation—to the detriment of religious freedom. And the need for review is confirmed by the host of recent lower-court cases cited by

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[1] The Episcopal Church's Third Post-Trial Br. 9, *In re Multi-Circuit Episcopal Church Litig.*, No. CL 2007-248724 (Fairfax County Cir. Ct.) (filed Oct. 14, 2011) (emphasis in original).

respondents (Opp. 20-25), by the *Timberridge* and *Christ Church* petitions, by numerous commentators (Pet. 26-27), by petitioners' *amici*, and by a denomination's petition filed two weeks ago (No. 11-1393).

At bottom, the question presented is a simple one: Does the First Amendment *require* courts to enforce unilateral denominational "trust" provisions, or may courts determine whether such provisions are legally cognizable under ordinary state law? That question is vitally important. It is cleanly presented. It has deeply divided the lower courts. And it cannot be definitively resolved without this Court's guidance.

I. The decision below does not rest on state law, but on the notion that the court was "*bound*" by *Jones*.

The decision below does not rest on an adequate state-law ground—much less an independent one. The court below set aside ordinary trust and property law, fifteen state-law defenses, all non-"documentary" evidence of intent, the trial court's implied trust ruling, and petitioners' challenges thereto—all on account of *Jones*. Pet. 49a, 43a, 39a-40a.

Respondents' contention that the court below "did not base its decision on constitutional law" (Opp. 1) is untenable. The court squarely held that "*Jones* * * * 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." Pet. 42a-43a. That (mistaken) determination explains the rest of the opinion.

Respondents now say the court "[*i*]*n essence* * * * determined that state law principles favoring the en-

forcement of written promises were the principles that applied." Opp. 11 (emphasis added). But respondents do not identify these "state law principles." Neither did the court below.

The lengthy passage quoted by respondents (Opp. 7-9) proves the point. That passage cites not a single state statute or case.[2] Nor does the court attempt to explain why the facts it cites would satisfy state law. Instead, the court rehearsed the facts it viewed as compelling recognition of a trust *under Jones*—namely, the 1979 Dennis Canon and the Church's 1956 affiliation documents. Pet. 30a.[3]

For the same reason, the court excluded all non-"*documentary* evidence" that might have demonstrated petitioners had no intent to sign over any property to respondents. Pet. 38a; see Pet. 5-7. According to the court, "the subjective intent and personal beliefs of the parties, including those of the donors are, *according to Jones*, irrelevant in an express trust case." Pet. 39a-40a (emphasis added).

Had the court below applied state law, its analysis would have looked quite different. For example, the Connecticut statute of frauds requires not only a signed writing, but one that identifies the specific

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[2] Respondents' *fact* section invokes two sect-specific state laws. Opp. 4 n.2. The decision below does not.

[3] Remarkably, respondents say the court below "held" that the Dennis Canon made express a trust relationship that has been "implied" since 1789. Opp. 5. That disputed issue was not reached. Pet. 4a-5a, 27a, 49a (*repeatedly* declining to review the trial court's implied trust ruling and relying exclusively on the Dennis Canon).

property being conveyed.[4] The same rules apply to express trusts.[5] Yet neither the Church's affiliation document nor the Dennis Canon refers to particular property. Further, a trust is not enforceable under Connecticut law without a declaration by the *settlor*—the title holder—whereas the Dennis Canon is a declaration by the would-be *beneficiary*.[6] Finally, contrary to respondents' assertion (Opp. 12), Connecticut does not allow voluntary associations to transfer their members' property to themselves.[7]

But the court below swept these state-law principles aside, *based on Jones*. It found state-law arguments—including fifteen defenses—"no longer relevant" precisely because it believed *Jones* held "that civil courts would be *bound* by a [denominational trust] provision, as long as the provision was enacted *before* the dispute occurred." Pet. 49a, 43a. Indeed, had state law governed, consideration of the Dennis Canon would have been precluded because property interests are assessed based on rules in effect at the time of conveyance.[8]

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[4] Conn. Gen. Stat. §52-550; see *Montanaro Bros. Builders, Inc.* v. *Snow*, 190 Conn. 481, 486 (1983).

[5] *Hanney* v. *Clark*, 124 Conn. 140, 144-145 (1938).

[6] Conn. Gen. Stat. §52-550; Restatement (Third) of Trusts §§ 13, 22 (2003).

[7] *Grand Lodge* v. *Reba*, 97 Conn. 235, 237 (1922).

[8] *All Brand Importers, Inc.* v. *Dept. of Liquor Control*, 213 Conn. 184, 199 (1989). Presumably that is why respondents did not invoke the Dennis Canon until the court below *sua sponte* invited them to do so. Pet. 8-9.

Our point is not to make our case under Connecticut law—a matter for remand. *E.g.*, *Jones*, 443 U.S. at 609-610 ("[t]his Court * * * does not declare what the law of [the State] is"; remanding for state-law proceedings). Our point is that respondents' suggestion that the court below has already applied state law is pure fiction—as confirmed by their more candid description of the decision's significance in other courts. *Supra* at 2. From beginning to end, this was a federal constitutional decision.

II. Respondents' attempt to reduce the lower court disarray to a tidy factual formula ignores the conflicting legal frameworks.

Respondents' treatment of the lower-court split is similarly flawed. Respondents point to facts that (they say) run through every case where the denomination prevailed. Opp. 1, 13. But as a review of the cases demonstrates, it is not the facts, but *the constitutional framework* for assessing them, that divides the courts. Pet. 16-23.

A. The decision below conflicts with decisions of the Eighth Circuit and five state supreme courts.

In *All Saints*, South Carolina's high court held that "the neutral principles of law approach permits the application of property, corporate, and other forms of law to church disputes." 385 S.C. at 444. Under neutral law, the Dennis Canon had no "legal effect." *Id*. at 449. Respondents say the court "made no mention of promises made by the local church" or of other denominational canons. Opp. 18. But that is because those facts had no salience in light of the "axiomatic principle of law 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." 385 S.C. at 449. By contrast, the court below held the same defense "no longer relevant" after *Jones*. Pet. 49a.

Respondents suggest *Arkansas Presbytery* turned on a lack of evidence that the local church intended to be bound by a denominational trust provision. Opp. 18. In fact, the Arkansas Supreme Court's decision turned on a state-law principle—that "the parties to a conveyance have a right to rely upon the law as it was at th[e] time [of conveyance]." 344 Ark. at 344; cf. *id.* at 346 (Imber, J., dissenting) (insisting that *Jones* "*bound*" the court "because [the trust provision] was in effect for several years before the dispute"). And concerning the Eighth Circuit's *Church of God* decision, respondents ignore the court's holding that civil courts may apply "'objective, well-established concepts of trust and property law'" and "are not required to defer to an ecclesiastical determination of property ownership." 54 F.3d at 525-526.

Respondents say the New Hampshire Supreme Court's decision in *Berthiaume* is "inapposite" because it involved a Roman Catholic parish's suit to prevent the sale of property "to which the Bishop undisputedly held title." Opp. 19. Not so. The issue in *Berthiaume* was whether the sale violated the Bishop's "duties and powers as trustee of parish property" under various state laws. 153 N.H. at 243-244. The court was asked to resolve that issue by applying "Canon Law." *Id.* at 248. Citing *Jones*, the court declined: "[W]e will first consider only secular documents such as trusts, deeds, and statutes. Only if these documents leave it unclear which party should prevail will we consider religious documents, such as church constitutions and by-laws." *Ibid.*

Respondents discount any conflict with *St. Paul Church* or *St. James the Less* based on those decisions' reliance on evidence of local church intent. Opp. 14-15. But in *St. Paul Church*, Alaska's high court both tested the evidence of intent against "Alaska's statute of frauds" and analyzed whether any trust was "revocable" under state statutory law. 145 P.3d at 556-558. Likewise, in *St. James the Less*, Pennsylvania's high court analyzed whether the Dennis Canon was enforceable under state voluntary associations law, explaining: "Commonwealth [courts] are to apply the same principles of law as would be applied to non-religious associations"; "we are not simply deferring to a religious canon." 585 Pa. at 446, 452 (citation omitted).

The legal reasoning of these decisions sharply conflicts with the Connecticut Supreme Court's holding that it was "*bound*" by *Jones* to enforce the Dennis Canon, rendering petitioners' fifteen state-law defenses "no longer relevant." Pet. 43a, 49a. Yet the competing analytical approaches garner literally no comment from respondents.

B. The opinions of three other state supreme courts, consistent with the decision below, confirm that the split turns on differences over federal constitutional law.

Respondents' discussion of the cases on the other side of the split is equally superficial. In summarizing the Georgia Supreme Court's decisions in *Christ Church* and *Timberridge*, respondents cite carefully selected facts. Opp. 15-16. Yet they ignore the court's refusal to subject those facts to state law because, in its view, "requiring strict compliance with [Georgia's trust statute] * * * would be inconsistent

with the teaching of *Jones* v. *Wolf*." 290 Ga. at 101; accord 290 Ga. at 280.

Respondents also ignore the analytical framework of *Harnish* and *Episcopal Church Cases*. Opp. 16-17. As the court below recognized (Pet. 47a), *Harnish* marched through state statutory, property, and corporate law, finding no trust. 11 N.Y.3d at 351-352. Nonetheless, New York's high court held the Dennis Canon "dispositive" because *Jones* "requires" it. *Ibid*. Similarly, citing "the high court's words" in *Jones*, the California Supreme Court in *Episcopal Church Cases* held that requiring local churches to "ratify" denominational rules "*would* infringe on the [denomination's] free exercise rights." 45 Cal.4th at 487.

Indeed, TEC previously asked this Court to grant certiorari and summarily reverse *All Saints*, citing a conflict with *Harnish* and *Episcopal Church Cases*. Br. of Respondent The Episcopal Church, No. 09-986 (filed March 15, 2010). There could be no conflict, of course, if each decision rested entirely on state law. Here, however, respondents never discuss those portions of the courts' opinions that undermine their assertion that they were fact-bound, state-law rulings. Opp. 16-17, 20, 22-23.

Finally, respondents nowhere answer our showing that the evidential ruling below—that "the subjective intent and personal beliefs of the parties, including those of the donors are, according to *Jones*, irrelevant in an express trust case" (Pet. 39a-40a)—conflicts with rulings of the Alaska, Kentucky, and Mississippi Supreme Courts. Pet. 24-25.

In sum, *Jones* is susceptible to irreconcilable interpretations. The split has become entrenched, and cannot be resolved without this Court's intervention.

III. This is an ideal time and case to resolve this important and recurring issue.

A. Respondents do not deny that the question presented is important and recurring. As commentators and the *amici* confirm, litigation and uncertainty are prevalent and increasing. Respondents' catalogue of Episcopal cases—including *sixteen* decided since 2008 (Opp. 20-26)—only underscores this fact. Eighteen of respondents' cases are lower state-court rulings, and several of them are non-final.[9]

Respondents point to certiorari petitions denied a few years ago (Opp. 28 n.9), but the split has since deepened and respondent TEC itself supported certiorari in *All Saints*. Moreover, earlier this month the Presbytery of South Louisiana filed a petition presenting the same question and citing the same split. Thus, including *Timberridge* and *Christ Church*, four petitions raising the same question have been filed since March.

B. Respondents do not deny the costs inflicted on local churches unsure if they can leave a denomination (or fearful of joining one), or that litigating these cases forces both sides to make major outlays that they would rather devote to mission. As the

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[9] At least five of respondents' cases were decided under a hierarchical "deference" approach, *not* neutral principles. *Tea* v. *Protestant Episcopal Church in Diocese of Nev.*, 96 Nev. 399, 402 (1980); *Protestant Episcopal Church in Diocese of N.J.* v. *Graves*, 83 N.J. 572, 580 (1980); *Episcopal Diocese of Mass.* v. *DeVine*, 59 Mass. App. Ct. 722, 728 (2003); *Daniel* v. *Wray*, 158 N.C. App. 161, 168 (2003); *Bennison* v. *Sharp*, 121 Mich. App. 705 , 720-721 (1982).

Presbytery of South Louisiana's petition explains (at 15): "National denominations and their judicatories have been exposed to enormous expense and uncertainty related to the effectiveness of long-established trust clauses. This issue needs to be put to rest so that the parties on both sides of the issue can definitively know what their rights and responsibilities are." *Jones*' promise of greater predictability has not been realized.

C. The extraordinary nature of the notion that denominations have a constitutional right to judicial enforcement of church law in civil property disputes further underscores the importance of review. Pet. 29-33.

We agree that the law need not "always be applied equally to churches" and "secular associations." Opp. 13 n.5. But there is an established framework for differential treatment: Accommodation must "alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corp. of Presiding Bishop* v. *Amos*, 483 U.S. 327, 335 (1987). Granting denominations the right to transfer ownership of affiliated churches' properties does not relieve such a burden. As *Jones* confirms, the "burden involved" in "modify[ing] the deeds or the corporate charter to include a right of reversion or trust in favor of the general church" is "minimal." 443 U.S. at 606. And once it becomes clear that granting denominations unique means of securing the property of others is *not* a valid accommodation, the Establishment Clause problem is plain. Pet. 32-33; see also *Milivojevich*, 426 U.S. at 734 (Rehnquist, J., dissenting) (criticizing

"blind deference" as creating "serious problems under the Establishment Clause").

D. In any event, even if *Jones permits* adopting a rule putting church discipline on par with a deed, *Jones* does not *require* it. And the interplay between these two constitutional concerns—whether the First Amendment *requires* States to depart from ordinary property and trust law in favor of unilateral denominational changes in canon law, and whether it *forbids* States from doing so—is what makes this case such an excellent vehicle. Even if civil law enforcement of such "trust" provisions is not *forbidden*, this Court's determination whether such enforcement is *required* will resolve the question presented here.

The decision below rests on the extraordinary proposition that denominations have a constitutional right to appropriate the property of affiliated churches without complying with ordinary civil law. If that improbable reading of dictum from *Jones* is indeed the law of this land, it should come from a decision of this Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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