No. 17-1136

In the Supreme Court of the United States

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF SOUTH CAROLINA, *ET AL.*,
PETITIONERS,
v.
THE EPISCOPAL CHURCH, *ET AL.*,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF OF THE FALLS CHURCH ANGLICAN AND THE AMERICAN ANGLICAN COUNCIL AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the "neutral principles of law" approach to resolving church property disputes requires courts to recognize a trust on church property even if the alleged trust does not comply with the State's ordinary trust and property law.

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INTRODUCTION AND INTERESTS OF AMICI CURIAE

This amici curiae brief is submitted in support of the Petitioners.[1] Amici curiae The Falls Church Anglican and the American Anglican Council have a substantial interest in the granting of the Petition. As detailed in the Petition, there is a well-developed and growing split among state supreme courts, and there are competing interpretations across the lower courts, regarding the application of the "neutral principles of law" analysis of *Jones v. Wolf*, 443 U.S. 595, 599 (1979), to church property disputes. *See* Pet. 1-5, 7-8, 18-29. As a result, there is confusion across denominations, dioceses, and congregations as to their respective legal rights when one party alters its existing affiliations with others, and there is an increased probability that changes in such affiliations will lead to costly litigation as the parties seek to determine unclear legal rights. This costly litigation has burdened many congregations and dioceses, including not only the Petitioners here but also amicus The Falls Church Anglican and the congregations served by amicus American Anglican Council. Further, some courts, such as the court below, have interpreted *Jones* to permit or even require judicial inquiries into questions of church polity and judicial enforcement of internal church canons. Such inquiries

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[1] Counsel of record for all parties received timely notice of the filing of this brief. Counsel for all parties have consented to its filing and those consents are being lodged herewith. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

are unavoidably selective and incomplete, giving rise to serious First Amendment concerns. This Court's granting of the Petition and resolution of the split will directly benefit the many congregations (such as amicus TFCA) and dioceses (such as Petitioner The Protestant Episcopal Church in the Diocese of South Carolina ("the Diocese")) that have been embroiled in such litigation with TEC, as well as congregations and church bodies across other denominations.

Amicus *The Falls Church Anglican*[2] ("TFCA" or "the Church") is a large Anglican congregation worshipping in the City of Falls Church, Virginia. In 1732, more than a half century before The Episcopal Church ("TEC") or any of its dioceses were formed, The Falls Church was founded as a colonial congregation under the established Church of England. Its Vestry during colonial times included both George Washington and George Mason, who played major roles in its early history. The Church broke its ties to the established church during the American Revolution. The Church and several other churches formed a diocese in Virginia in 1785, which then affiliated with TEC upon its formation in 1789.

In December 2006, the TFCA congregation voted by a 90% majority to disaffiliate from Respondent The Episcopal Church ("TEC") and its affiliated Virginia diocese. Following this disaffiliation, TEC and the Virginia diocese sued TFCA and ten of its sister churches that had similarly voted to disaffiliate, along

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[2] The Falls Church Anglican is incorporated in Virginia under the legal name "The Church At The Falls – The Falls Church" but uses the registered name "The Falls Church Anglican" as its primary name for conducting its ministries and operations.

with their respective senior clergy and lay volunteers serving on the churches' vestries (governing boards). Thus began eight years of complex multi-party litigation. The initial stages included two trials resulting in a victory on state statutory grounds for TFCA and the other churches in 2008, subsequently reversed and remanded by the Virginia Supreme Court in 2010. After a six-week trial on remand, the trial court in early 2012 ruled against TFCA and the remaining congregations (several had settled) and ordered them to transfer their real and personal property to TEC and the Virginia diocese. TFCA alone appealed this ruling. In 2013, the Virginia Supreme Court ruled against TFCA. After discussing the *Jones* neutral-principles analysis, the court imposed a constructive trust for the benefit of TEC and the Virginia diocese on TFCA's real and personal property, relying on TEC's 1979 Dennis Canon, even though no constructive trust theory had been pled, pressed, or briefed at any point during the litigation of the case.[3]

TFCA filed its petition for certiorari with this Honorable Court on October 9, 2013.[4] The petition was distributed for consideration at five separate conferences (Nov. 20, 2013; Jan. 8, 2014; Feb. 10, 2014;

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[3] *See The Falls Church v. Protestant Episcopal Church*, 285 Va. 651, 667-72, 740 S.E.2d 530 (2013). *See also id.* at 672 ("even if implementation of the Dennis Canon was unilateral, this Court would be powerless to address any issues of inequity wrought thereby, as to do so would involve judicial interference with religion and clearly violate the First Amendment.").

[4] *The Falls Church v. The Protestant Episcopal Church, et al.*, No. 13-449.

Feb. 24, 2014; and Mar. 3, 2014), before ultimately being denied on March 10, 2014.[5]

Amicus *American Anglican Council* ("AAC"), a nonprofit religious corporation founded in 1996, is a network of individuals (lay and clergy), parishes, dioceses, and ministries who affirm biblical authority and Christian orthodoxy within the Anglican Communion. Through advocacy and counsel, leadership development, and equipping the local church, the Council seeks to build up and defend "Great Commission" Anglican churches in North America and worldwide. The Council regularly assists Anglican churches and dioceses in distress who are the subject of litigation by TEC and its affiliates. The Council also monitors such litigation and reports on it to the broader Anglican Communion. The Council seeks to represent the important perspective of local Anglican and other congregations in church property litigation where incorrect interpretations of the law could have a significant adverse impact upon congregational property rights. Consistent with its mission, the Council has a strong interest in seeing that neutral principles of trust and property law are correctly and consistently applied to resolve church property disputes. The Council is particularly concerned that the decision below will have a significant chilling effect upon the ability of individual dioceses and congregations—not only within the Anglican tradition but across a broad range of denominations—to acquire, maintain, and develop property, to use that property to carry out their important religious and charitable missions, and to

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[5] *The Falls Church v. The Protestant Episcopal Church*, 134 S. Ct. 1513 (2014).

affiliate with denominational entities on clear and unshifting terms and conditions.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant the Petition and Clarify the Application of *Jones v. Wolf's* Neutral-Principles Standard to Reduce Church Property Litigation and the Burdens It Imposes on Congregations, Dioceses, and Denominations.

The conflict and uncertainty in the law arising from competing interpretations of *Jones*' neutral-principles analysis impose real and substantial burdens upon congregations and dioceses such as the Petitioners here. As the Petition explains, there is a deep, acknowledged, and matured split among and within the nation's courts over the meaning of *Jones*' neutral-principles approach. Pet.18. Amicus TFCA detailed this significant split in its own petition for certiorari in 2013. This split has only widened and further matured since that time. And, in a sad irony, the South Carolina Supreme Court jumped from one side of the split to the opposite side by its decision in this case.

This discord among the many states that have decided the issue causes further confusion in those states where the highest court has not yet ruled. A diocese's or congregation's legal rights in the event of disaffiliation are not clearly established and they must guess whether the state's highest court will embrace the hybrid reading of *Jones*, with its attendant subjectivity and ambiguities, or the correct interpretation of neutral-principles. And even several

states that once had definitive rulings refusing to recognize denominational trusts unless embodied in legally cognizable forms in accordance with general state trust and property laws have reversed course, as the highest courts of South Carolina and of Virginia have done in the cases of Petitioners and of TFCA.[6]

The absence of clear and consistent nationwide application of the neutral-principles analysis gives rise to increased litigation by congregations, dioceses, and denominations seeking to determine their respective legal rights in the event of disaffiliation. Such litigation often results in the added difficulty and incongruity of a court evaluating questions of and enforcing one party's understanding about the polity of a particular church, ironically all in the name of applying *Jones*' "neutral principles of law ... developed for use in all property disputes." *Jones*, 443 U.S. at 599, 602 -603.

These burdens have certainly harmed these amici and their members. The Falls Church Anglican and a substantial number of the congregations served by the American Anglican Council have been involved in protracted, burdensome, and costly litigation with TEC about the ownership and control of their real and personal property. The AAC has monitored the lawsuits instituted by or on behalf of Respondent TEC. By even the most conservative calculations, TEC has directly or indirectly caused to be filed more than fifty-five lawsuits against dioceses, churches, clergy, and volunteer vestry members seeking to obtain title to and control of diocesan or congregational property

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[6] *See* Pet.13-14; App.10a; App.43a; *The Falls Church v. Protestant Episcopal Church*, 285 Va. 651, 667-72, 740 S.E.2d 530 (2013).

following disaffiliation from TEC.[7] And although volunteer vestry (governing board) members do not hold title to church property, the AAC has found at least forty-eight instances where TEC or its affiliated entities have sued such volunteer vestry members, even in some cases seeking monetary damages against the individual volunteers.[8]

Amicus TFCA presents a compelling example of the high financial and human costs of the litigation that results from such confusion regarding *Jones'* neutral-principles analysis. Throughout its long history, title to TFCA's property had always been held by its vestry or trustees, not by TEC or its Virginia diocese. None of TFCA's deeds referred to TEC, the Virginia diocese, or their canons. TEC and the Virginia diocese were not named as grantees in any of the deeds. The Virginia laws and the church canons in effect at the times that TFCA affiliated or reaffiliated with the Virginia diocese recognized that the vestry or trustees held title to church property for the benefit of the TFCA congregation, not for TEC or its Virginia diocese. And for more than two centuries, the Virginia courts had ruled again and again that Virginia law did not recognize implied or express trusts for a denomination in local church property.[9] In reliance on

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[7] *See* American Anglican Council, *The Episcopal Church: Overbearing and Unjust Episcopal Acts* (Feb. 2010), at 1-2, 22-26, *available at* https://americananglican.org/wp-content/uploads/2014/02/TEC-Overbearing-and-Unjust-Episcopal-Acts-Feb-2010.pdf (visited March 25, 2018).

[8] *Id.* at 1-2.

[9] *See, e.g., Green v. Lewis*, 221 Va. 547, 555, 272 S.E.2d 181, 185-86 (1980); *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 505, 201 S.E.2d 752, 756-57 (1974).

this apparently clear legal and factual foundation, TFCA over the years acquired and improved eleven parcels of real property that were conservatively appraised at the time of disaffiliation as worth more than $25,000,000. From 1950 to 2003, TFCA spent $15.9 million (more than $26.6 million in today's dollars) on improvements, and $8.1 million (more than $12.9 million in today's dollars) on upkeep, whereas neither TEC nor its Virginia diocese contributed a dime. Yet, purporting to apply *Jones v. Wolf*, the Virginia courts relied upon TEC's Dennis Canon to create a constructive trust in TFCA's real and personal property for the benefit of TEC and its Virginia diocese and to order TFCA to transfer that property to them. The Virginia courts also refused to honor specific legal restrictions that donors to TFCA had placed on their contributions, despite the protestations of many donors and of the Virginia Attorney General. Stripped of its property and its savings, TFCA was forced to shoulder the added financial and human burdens of relocating its large congregation, more than 60-person staff, and dozens of vibrant ministries and community services, and to begin anew.

Sadly, the instant case provides a yet more painful example of the great harms caused by the unclear, inconsistent, and shifting hybrid interpretation of *Jones*' neutral-principles standard. The majority decision below will impose similar financial and human burdens on the twenty-nine Petitioner congregations, including several churches with congregations and operations on the scale of TFCA. Beyond that, the majority decision below also imposes comparable burdens on the Diocese itself (and on its Trustees Corporation that holds title to the Diocese's valuable Camp St Christopher property).

The problems of increased judicial evaluation of issues of church polity under the hybrid approach to *Jones* are magnified yet still more in the case of dioceses such as the Petitioner here. There is substantial historical evidence and legal and scholarly analysis demonstrating that the diocese, not the denomination, is the fundamental unit of Episcopal polity in the United States.[10] Among other things, the dioceses that established TEC pre-existed TEC chronologically, conceptually, and legally. It was the dioceses (then co-extensive with the newly-independent states) that created TEC's constitution and General Convention in 1789, and thus that

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[10] *See, e.g.*, *Bishops' Statement On The Polity Of The Episcopal Church* (April 2009) 17, *available at* http://www.anglicancommunioninstitute.com/wp-content/uploads/2009/04/bishopsstatement_pdf.pdf (accessed March 25, 2018); Mark McCall, *Is The Episcopal Church Hierarchical?* (September 2008), at 73, *available at* http://www.anglicancommunioninstitute.com/wp-content/uploads/2008/09/is_the_episcopal_church_hierdoc.pdf (accessed March 25, 2018).

Other scholars have concluded that congregations, rather than the denomination or even dioceses, are the fundamental unit of Episcopal polity in the United States. *See, e.g.*, Colin Podmore, *A Tale of Two Churches: The Ecclesiology of the Episcopal Church and the Church of England Compared*, 8 International Journal for the Study of the Christian Church 124, 129 (May 2008) ("The state churches (later called dioceses) and the General Convention were constituted in the 1780s by pre-existing parishes and congregations uniting in 'voluntary associations', and, in that sense, the congregations are the fundamental units of The Episcopal Church – precisely the opposite of the position in the Church of England."); John Booty, *The Church in History* 71 (Seabury Press 1979) ("Dioceses and national convention possessed power in relation to and for the sake of parishes.").

created TEC.[11] Indeed, TEC's official commentary on its constitution and canons states that "[b]efore their adherence to the Constitution united the Churches in the several states into a national body, each was completely independent," and describes the national body they created as "a federation of equal and independent Churches in the several states."[12] Yet Respondent TEC continues to dispute this evidence, and there continues to be scholarly debate over these historical facts and their present implications.[13] But these disputes about and judicial inquiries into church polity can largely be avoided if this Court grants the Petition and clarifies the correct application of the *Jones* neutral-principles analysis.

The majority below applied a church canon to create a legal trust enforceable by the secular courts. But in interpreting and legally enforcing TEC's Dennis Canon, the majority unavoidably engaged in selective, incomplete, and thus erroneous application of the church's canons. The court interpreted and applied a specific canonical provision – the Dennis Canon – but ignored the text, structure, and history of the full TEC

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[11] Mark McCall, *Is The Episcopal Church Hierarchical?*, at 13.

[12] *Id.*, *quoting* Edwin A. White & Jackson A. Dykman, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America otherwise known as The Episcopal Church* (Church Publishing Inc., New York 1981 & 1997 reprint), at 12, 19.

[13] *Compare, e.g.*, Mark McCall, *The Episcopal Church and Association Law: Dioceses' Legal Right to Withdraw*, 2 JOURNAL OF EPISCOPAL CHURCH CANON LAW 191 (February 2011), *with* James Dator, *Where Is The Locus Of Authority Within The Episcopal Church?*, 2 JOURNAL OF EPISCOPAL CHURCH CANON LAW 131 (February 2011).

constitution and canons that demonstrate that the dioceses, not the national denomination, are the fundamental unit of Episcopal polity. This is an inherent danger of the hybrid interpretation of *Jones*' neutral-principles analysis. Once a secular court ventures into church canons to create an enforceable legal trust or property right, how can the court limit its analysis to a single provision without any regard for other potentially relevant canons and for the structure of governance and affiliation established by the constitution and canons more broadly? Having entered the religious thicket to create an enforceable legal right based upon a single canonical provision alone, the court then faces a difficult, if not insoluble, constitutional dilemma. Either the court must ignore other canons, and thereby prefer one religious position over another. Or it must venture further into the canonical thicket to assess, interpret, and apply any other relevant canonical provisions. Both approaches create grave First Amendment concerns.

Of course, the solution to this selective judicial enforcement of church canons is simple. The secular courts should stay out of the thicket and decline to treat any church canon as creating legally enforceable trust and property rights. That is precisely what the correct interpretation of *Jones*' neutral-principles approach requires. Whatever legal interest a church canon purportedly creates must be embodied in a legally cognizable form – such as a title document or a formal deed of trust that complies with the requirements of established state trust law – if it is to be enforceable by the courts. By granting the Petition, this Court can bring urgently needed clarity to this area of the law.

II. This Court Should Grant The Petition and Clarify That *Jones v. Wolf* Does Not Require Courts to Enforce Canons That TEC Itself Has Repeatedly Admitted Are Not Legally Cognizable and Have No Civil Law Effect Without Statutory Support.

Four of the five opinions that form the fractured decision below found that TEC's Dennis Canon –a unilateral ecclesiastical declaration that all parishes affiliated with The Episcopal Church hold their property in trust for the national church – was applicable and enforceable against Petitioners under the hybrid approach to *Jones'* neutral-principles standard.[14] By giving substantial legal effect to the Dennis Canon, the opinions below are in direct conflict with the repeated admissions of TEC for more than a century that TEC's canons have only moral and not legal effect, and therefore are in conflict with *Jones'* neutral-principles standard as well. TEC has made these admissions in resolutions of its triennial legislative body, the General Convention, and in the repeated statements of its authorized official commentary on the TEC Constitution and Canons. TEC has made these admissions both before and after enactment of its 1979 "Dennis Canon" regarding congregational property and has reaffirmed them as recently as 1997.

1. The 1868 Canon and 1871 Amendment. The *Constitution* of TEC from its inception in 1789 through

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[14] *See* App.10a, 17a-18a (Acting Justice Pleicones); App.42a-43a (Justice Hearn); App.58a-61a (Chief Justice Beatty) (parishes' accession in writing to the Dennis Canon created a trust). *See also* App.64a (Justice Kittredge) (Dennis Canon established a trust but parishes revoked this trust).

the present has never actually addressed congregational or diocesan property. To the extent that such property is addressed, it is addressed only in the TEC *Canons*. Yet the TEC Canons were silent as to congregational or diocesan property until after the Civil War. The first TEC Canon addressing congregational property was not adopted until 1868. Canon 21 of Title I provided that a consecrated Church could not "be removed, taken down, or otherwise disposed of for any 'unhallowed, worldly, or common use" without the previous consent of the Bishop of the Diocese, acting with the advice and consent of the Standing Committee of the Diocese…."

The TEC General Convention expressly recognized, in amending this canon in 1871, that such anti-alienation canons did not have any independent legal force. Rather, the General Convention adopted a formal resolution recommending that Diocesan Conventions should "take such measures as may be necessary, by State legislation, or by recommending such forms of devise or deed or subscription," to secure parish property under this Canon. *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* (Printed for the Convention 1872), at 372.

2. The 1898 White Treatise. This understanding that the TEC anti-alienation canons must be embodied in statutory law to have any legal effect was acknowledged by the leading expert on the TEC

Constitution and Canons a quarter century later.[15] In his 1898 treatise, the Rev. Edwin A. White stated:

> Although the Canons of the Church require the consent of the Bishop and the Standing Committee to the alienation of the real property of the corporation, the Courts have decided that, to have any legal effect, it must also be a provision of the Statute Law. "Titles to property must be determined by the laws of the State."

Edwin A. White, *American Church Law: Guide and Manual for Rector, Wardens and Vestrymen of the Church Known in Law as "The Protestant Episcopal Church in the United States of America"* (1898) 159, *quoting Sohier v. Trinity Church*, 109 Mass. 1 (1871). In taking this position, White's treatise quoted a Massachusetts Supreme Court decision that foreclosed any possible ambiguity on this point:

> The canons of the Protestant Episcopal Church, which are referred to in the bill, requiring the defendants to obtain the consent of the bishop and standing committee, for removing, taking down, or otherwise disposing of a church, *do not affect the legal title to the property held by these defendants under the deeds above mentioned*. Titles to property must be determined by the

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[15] As a leading historian of TEC has explained, the Rev. Edwin A. White was an attorney and Episcopal priest who "was a venerated senior scholar of the Church and the chair of the House of Deputies' Committee on Canons." Robert W. Pritchard, *The Making and Re-making of Episcopal Canon Law* (August 2009), *available at* http://www.anglicancommunioninstitute.com/2010/02/the-making-and-re-making-of-episcopal-canon-law/ (accessed March 25, 2018) (hereinafter "Pritchard, *Episcopal Canon Law*").

> laws of the Commonwealth. *The canons are matters of discipline, and cannot be enforced by legal process*.

Sohier, 109 Mass. 1, 23 (italics added).

3. The 1924 Official TEC Commentary. In 1919 and 1922, the TEC General Convention called for the creation of a definitive commentary on the TEC Constitution and Canons and appointed White to author it. *See* Pritchard, *Episcopal Canon Law*, at 10. In 1924, White published the first edition of this official commentary. Edwin A. White, *Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of American Adopted in General Conventions 1789-1922, Annotated, with an Exposition of the Same, and Reports of Such Cases as have arisen and been decided thereunder* (New York: Edwin S. Gorham, 1924), iii. This official commentary on the TEC Constitution and Canons, in its exposition of this canon (now renumbered as Canon 50), reinforced the conclusions of White's 1898 treatise that such canons have only moral and not legal effect:

> The Canon requires no exposition except to call attention to the necessity of some provision of the statute law of the State requiring the consent of the Bishop and Standing Committee to the alienation of any real property of a religious corporation, if such requirement is to be made effective. The requirement of the Canon to that effect is only of moral value, and has no legal effect.

Id. at 785.

The 1924 official commentary explained the reasons for the 1871 amendment of this canon. In 1871, the rector of Christ Church in Chicago was deposed as a TEC priest, but subsequently went into the Reformed Episcopal Church. "[H]e took the property of Christ Church with him, and the Courts sustained the transfer, holding that there was no law to prevent it." Although the General Convention amended the anti-alienation canon that same year to attempt to address such a situation, it "recognized that while this was as far as the Convention could legislate in the matter, it was not sufficient to prevent such alienation," and therefore adopted the resolution "recommending that Diocesan Conventions take steps to procure legislative action by which such alienation could be prevented." *Id.* at 786.

This understanding that any anti-alienation or other property canons have only moral and not legal effect is reflected elsewhere in the 1924 official commentary. For example, the volume discussed a narrowly focused canon (Canon 25) applying only to religious communities (not congregations), which provided that the constitution of the religious community should include express language stating that the community's real estate "shall be held in trust for the community as a body in communion with this Church." *Id.* at 539. The commentary concluded that even such an express provision in the canons would not be legally cognizable:

> It would seem to be the intention of this provision to secure the property of the Community from being alienated from the Church in case the Community should officially sever its connection with the Church. If that is the intention thereof, it is very imperfectly

> expressed, and *in any event it could only have moral weight. However expressed in a canon it would have no legal force*.

Id. at 542 (italics added).

4. The 1954 Annotated Constitution and Canons. In 1949, the TEC General Convention called for "publication of a new annotated edition of the constitution and canons." Edwin A. White & Jackson A. Dykman, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America* (Second Ed., Rev. 1954) (Seabury Press 1954) vol. 2, at iv. This was to be an updated version of White's 1924 commentary, to be prepared by the then-Chair of the General Convention's Committee on Canons and carefully reviewed and approved by members of a special Joint Committee on behalf of the General Convention.[16] *Id*. at v.

The resulting 1954 volume acknowledged that the "power of the General Convention over the disposition

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[16] The 1952 General Convention appointed a "Joint Committee to Supervise Publication of a New Annotated Edition of the Constitution and Canons" comprised of five bishops, five priests, and five laymen with particular expertise in theology and/or law. *Id*. at v-vi. Jackson A. Dykman, the chair of the General Convention's Committee on Canons, was appointed to prepare a draft of the updated volume for review by the Joint Committee, and each member was provided galley proofs of the manuscript to afford "the opportunity to make his own study of the material prepared by the annotator and to prepare suggestions for correction, clarification, and improvement." *Id*. at v-vii. In publishing the 1954 volume, the Joint Committee expressly stated that "pursuant to the mandate of the General Convention it has reviewed the proofs of this new annotated edition of the Constitution and Canons and has approved the text." *Id*. at iv.

of real property is questionable, governed as it is by the law of the state in which it is situated." *Id.* at 265. And it repeated White's earlier discussion of the General Convention's 1871 resolution recognizing that such canonical provisions were "not sufficient to prevent such alienation," and "recommending that Diocesan Conventions take steps to procure legislative action by which such alienation could be prevented." *Id.* at 431.

4. The 1981 Annotated Constitution and Canons. Even after TEC's adoption of the Dennis Canon regarding congregational property in 1979,[17] TEC continued to admit, in its subsequent revisions of its *Annotated Constitution and Canons*, that "[t]he 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." Edwin A. White & Jackson A. Dykman, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America otherwise known as The Episcopal Church* (Church Publishing Inc., New York 1981 & 1997 reprint) at 297 (hereinafter the "*1981 Annotated Constitution and Canons*").[18] State laws control the conveying and

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[17] TEC Canon I.7.4.

[18] The statements in the 1981 *Annotated Constitution and Canons* (reprinted in 1997) clearly constitute admissions by Respondent TEC. The TEC General Convention directed the editing, updating, publication, and sale of the *Annotated Constitution and Canons*. *Id.* (Foreword to the 1997 Reprint). The volume was "revised and updated by the Standing Commission on Constitution and Canons of the General Convention." *Id.* It is explicitly presented "as an authoritative expression of the meaning of the Constitution and Canons of the Episcopal Church as they exist at this time." *Id.* And the stated copyright is in the

encumbering of real estate, as recognized by the exception at the end of the Canon, which gives diocesan conventions power "to make provision by local canon for the encumbrance or alienation of real property, differing from that prescribed by this canon, and so adapt the process to local law." *Id.* at 297.

The *1981 Annotated Constitution and Canons* acknowledges that TEC's Dennis Canon is **not** "declaratory of existing law" – that is, it does not simply memorialize a previously recognized denominational trust interest in congregational properties – but rather was adopted by the TEC General Convention in 1979 in response to the decision in *Jones v. Wolf*. *Id.* at 301. The *1981 Annotated Constitution and Canons* also admits that the "neutral principles of law" approach set forth in *Jones* permits a congregation (or, by the same logic, a diocese) to disaffiliate from TEC while nevertheless continuing to own and occupy its property:

> This approach gives great weight to the actions of controlling majorities, and would appear to permit a majority faction in a parish to amend its parish charter to delete all references to the Episcopal Church, and thereafter to affiliate the parish—and its property—with a new ecclesiastical group.

Id. at 301. Of course, that is precisely what the Petitioners in this case did. *See* App.24a-25a; 81a-83a; 112a; 143a-48a; 151a. *See also* Pet.10-11.

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name of the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, the nonprofit corporation that holds title to TEC property. *Id.* (copyright notice).

As the Kentucky Supreme Court concluded after its examination of these admissions, "the official commentary in the annotated constitution for PECUSA [TEC] indicates that the restrictions on transfer are of moral value only and without legal effect." *Bjorkman v. PECUSA Diocese of Lexington*, 759 S.W.2d 583, 586 (Ky. 1988). In light of these admissions, the conclusion of the South Carolina Supreme Court majority that under *Jones v. Wolf* the Dennis Canon is legally cognizable and creates (either by its own action or upon accession by a congregation or diocese) a trust or property interest enforceable by the secular courts is completely untenable.

III. This Court Should Grant Review to Avoid the Serious Establishment Clause Concerns Raised by the Ruling Below.

Finally, treating a denomination's ecclesiastical canons as "self-executing" raises serious countervailing Establishment Clause concerns. Subsequent to *Jones v. Wolf*, this Court has recognized that the Establishment Clause is implicated if governments delegate to religious institutions authority over the rights of third parties.

In *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982), the Court rejected a state law that gave churches a veto over neighboring applications for liquor licenses, because the law "vest[ed] discretionary governmental powers in religious bodies." The Court held that in passing this law, the Massachusetts legislature granted churches a special benefit—the "power to veto certain liquor license applications." *Id.* at 122. The Court determined that the measure violated the Establishment Clause because it

advanced religion by allowing churches to act as government land-use regulators. *Id.* at 119-20.

The same problem could arise when churches are granted unique authority to establish themselves as beneficiaries of unilaterally declared property trusts. In this instance, a trust of this nature would supplant South Carolina's well-developed trust law and offer any purportedly hierarchical churches—and no other organizations—the power to revoke the property rights of any affiliated parish or diocese. Correspondingly, it is inconceivable that the special rights that a denomination seeks here would be extended to secular organizations.

The result in *Larkin* would no doubt have been different if the churches' veto power had been included in local covenants, conditions, and restrictions that were voluntarily agreed upon by the surrounding property owners, just as an express trust is. Under those circumstances, the churches would have enjoyed veto power under neutral principles of contract law. But nothing of the sort has happened here.

In sum, allowing religious denominations to unilaterally declare trusts in their own favor may well unconstitutionally delegate governmental authority to religious institutions. This delegation would also amount to a grant of power to religious denominations that no other organizations enjoy over their members. Such delegation and preferential treatment raises serious problems under the Establishment Clause.

CONCLUSION

For the foregoing reasons, Amici respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 2018